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88-1338

Supreme Court, U.S.
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No.

IN THE
Supreme Court of the United States
October Term, 1988

WILLIAM C. POLLARD,
Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Where a defendant in a criminal case establishes that materials sought by a subpoena from a third party corporation are relevant, admissible, and specifically designated, can that third party corporation's claim of work product protection constitute grounds for failure to enforce the subpoena consistently with the defendant's Sixth Amendment right to compulsory process, after that corporation pleads guilty to charges stemming from the investigation which gave rise to the preparation of the materials at issue?

2. Does the limited protection afforded work product materials rise to the dignity of an evidentiary privilege recognized by the common law, the Constitution, statute, or court rule, within the meaning of Fed. R. Evid. 501, so as to deny a defendant in a criminal case access to specifically designated, relevent and admissible documents which are material to his defense at trial?

3. In applying the work product doctrine within its own terms, what, if anything, more should be required to establish good cause for enforcing a subpoena for materials arguably covered by the work product doctrine beyond a showing that the subpoena meets the requirements of Fed. R. Crim. P. 17(c)?

4. Does the work product doctrine apply where the activities of counsel are material issues in a criminal trial, both to the Government's theory of conspiracy and fraud and to the defendant's proof that he was falsely offered up as a scapegoat by his former employer in an effort to secure lenient treatment for itself and to avoid implicating high level company officials?

PARTIES TO THE PROCEEDINGS BELOW

This case arises from a contempt citation in connection with a criminal case, *United States v. Pollard,* Crim. No. Y-87-

0142 (D.Md. [Pending Trial]). Martin Marietta Corporation was held in contempt for failing to produce materials subpoenaed by the defense after being ordered by the District Court to do so. William C. Pollard is the defendant in the underlying criminal case and the party seeking enforcement of the subpoena. The United States was a party to the proceedings below, but did not file a brief.[1]/

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[1]/ The Government sought an order from the Court of Appeals giving it permission to disclose to Pollard the contents of a position paper submitted to it by Martin Marietta. The Court of Appeals declined to render what it considered to be an advisory opinion. (App. 15a n. 3).

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WILLIAM C. POLLARD,

Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,

Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Cross-petitioner, William C. Pollard, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit dated September 6, 1988 in the event that this Court grants the petition for a writ of certiorari previously filed by Cross-Respondent, Martin Marietta Corporation, now pending before this Court in Case Number 88-1157.

OPINIONS BELOW

The opinion of the Court of Appeals dated September 6, 1988 is reported at 856 F.2d 619 (4th Cir. 1988) and is set forth in the Appendix at 1a-15a. The District Court order holding petitioner/cross-respondent in contempt and the order and opinion of the District Court directing petitioner to disclose the documents to respondent/cross-petitioner are not reported and are set forth in the Appendix at 18a, 19a-20a and

21a-31a, respectively.

JURISDICTION

The opinion of the Court of Appeals was issued and judgment entered on September 6, 1988. A timely petition for rehearing was denied on October 14, 1988 (App. 16a). On November 25, 1988, the Chief Justice granted Martin Marietta an extension of time to and including January 12, 1989 to file its petition for a writ of certiorari. The petition for a writ of certiori in connection with which this cross petition is filed was received by Pollard the day it was filed in Docket Number 88-1157, January 12, 1989. This cross-petition is filed within thirty days of that filing. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and Supreme Court Rule 19.5.

STATUTORY PROVISIONS

U.S. Const. Amend. 6:

> In all criminal prosecutions, the accused shall enjoy the right . . . to have the compulsory process for obtaining witnesses in his favor . . . .

Fed. R. Evid. 501:

> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. . . .

STATEMENT OF THE CASE

This case involves the right of a defendant in a criminal case to subpoena evidentiary materials vital to his defense where a third-party witness in possession thereof asserts a claim of work product protection. The District court and the Court of Appeals held that cross-petitioner, Pollard (the defendant in the underlying criminal case), met his burden under Fed. R. Crim. P. 17(c) and *United States v. Nixon*, 418 U.S. 683, 699-700, 702 (1974), of demonstrating relevancy, admissibility, and specificity with respect to the documents.

Upon reaching its Rule 17(c) determination, the District Court overruled Martin Marietta's claims that the documents were protected from disclosure on the basis of attorney-client privilege and the limited protections afforded work product materials based upon the same *in camera* review, reasoning that some of the materials in question were never privileged (App. 31a-33a) and that the Company waived any privilege as to the remainder through intentional selective disclosures to the government (App. 30a, 32a-33a). The Court of Appeals agreed that there had been a waiver, but disagreed as to its scope.

Although the Court of Appeals determined that Pollard was entitled to production of most of the materials at issue, it vacated the District Court order holding Martin Marietta in contempt for failing to comply with the order to produce the materials, on the grounds that Martin Marietta's waiver of work product privilege did not extend beyond the materials actually disclosed with respect to "pure mental impressions severable from the underlying data", even where such materials involved the same subject matter as the materials of which Martin Marietta had made testimonial use. Because the opinion below significantly expands the scope of the work product doctrine so as to to prejudice the exercise of the Sixth Amendment right of defendants in criminal cases to subpoena witnesses and materials vital to their defense, and because that expansion would otherwise be interpreted as controlling authority in Federal courts if Martin Marietta were to prevail on the issues

raised in its petition for a writ of certiorari, William C. Pollard files this cross-petition for a writ of certiorari.

The Martin Marietta Travel Project.

Pollard began his work on the travel project shortly after he began his career at Martin Marietta in 1981. He had no background in government contracting or reporting, and while employed at Martin Marietta Pollard never had any responsibility for managing or reporting any government contracting activity. (App 44a). Pollard was initially assigned to Martin Marietta's Data Systems subsidiary, in Orlando, Florida. Among other duties, he was given responsibility for keeping track of airline charges incurred by Data Systems employees. While doing so, he noticed that there were significant discrepancies in the costs incurred for the same or similar travel at different times and by different employees. He then approached company management in Orlando with the idea of saving money by requiring Data Systems employees to make their travel arrangements through a central travel operation controlled by the company, which would be responsible for obtaining the most economic arrangements practicable. The travel project thus had its genesis.

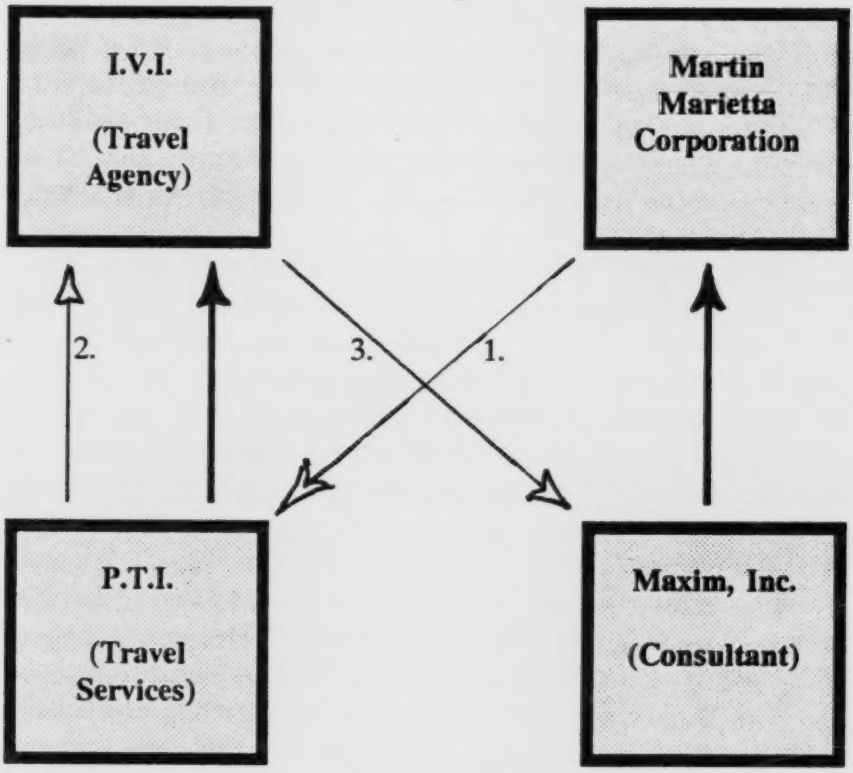
In time, the success of this travel project eventually reached the ears of officials at Martin Marietta corporate headquarters, and Pollard was given a new position --Director of Corporate Travel-- with the idea of implementing the program on a company-wide basis.

Martin Marietta Lawyers Create The Four Box Model.

Upon implementing the travel project on a company-wide basis, senior management established a corporate subsidiary apart from the company's federal contracting activities, to enable the project to become a profit center generating additional bottom-line revenue. (App. 44a-45a). The defense intends to show at trial that company lawyers --not Pollard--

conceived of a so-called "Four Box model", which, they believed, would properly allow Martin Marietta's new travel subsidiary to earn profits for Martin Marietta.

As the defense understands the indictment (App. 34a-43a), the Four Box Model can be viewed as follows:



Key:

Stock ownership and dividend payments

Payments for services:

1. Payments for travel services
2. Management fee
3. Consulting fees

I.V.I. was a large travel agency primarily furnishing travel services for corporate accounts. It organized Performance

Travel, Inc. ("P.T.I.") as a wholly-owned subsidiary solely for the purpose of servicing Martin Marietta's business, and Martin Marietta demanded and received an option to buy the stock of P.T.I. at any time. Maxim was organized as a wholly-owned subsidiary of Martin Marietta. The Model allegedly worked as follows: Martin Marietta paid for tickets purchased through P.T.I. (Arrow #1). P.T.I. received travel agency commissions, which were paid by the airlines. After deducting operating costs and a management fee paid to its parent, I.V.I. (Arrow #2), a significant amount was left over for the payment of dividends to I.V.I., which in turn made these funds available for billings by Maxim for consulting services (Arrow #3). Maxim's profits were then allegedly paid to Martin Marietta, as dividends.

Although Pollard was given the additional title of the Presidency of Maxim, he lacked any authority, responsibility or expertise to make policy concerning government contracting. The corporate structure and the contracts between the various entities were altogether conceived, negotiated and drafted by attorneys, principally Elliot Light[2/], who reported directly to senior Martin Marietta management. (App 37a, 46a).

In a memorandum (the "Vetter Memo") to Martin Marietta's General Counsel, Frank H. Menaker ("Menaker"), Light's successor, Assistant General Counsel William Vetter described the Four Box Model as "very imaginative in getting around the [airline] rebate restrictions." Vetter also said that, "the arrangement is neither illegal nor a violation of [federal airline] rules." J. ANDERSON, CIRCUMVENTING TICKET REBATES TO THE TREASURY, Washington Post, October 6, 1984 (The "ANDERSON ARTICLE").

Maxim's role in the model was essential to ensure success in reducing costs. I.V.I. provided access for reservation systems

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2/ Light coined the phrase "bucket" to describe the funds available in I.V.I. for Maxim's consulting fees.

and technical expertise necessary for ticketing; Maxim, however, had the thankless job of riding herd on Martin Marietta's corporate travelers to assure that the lowest cost travel arrangements were utilized. Pollard and other Martin Marietta personnel assigned to Maxim were required to do much of the leg work in setting up P.T.I. offices across the nation and hiring the necessary personnel. Thereafter, Pollard spent most of his time negotiating bulk contracts with air carriers, hotels and car rental agencies. As a result, the average cost of airfare declined at least 20% through these arrangements. [3]/ An internal audit showed that the Maxim--P.T.I.--I.V.I. arrangement was maximizing cost savings on car rentals and hotel accommodations as well.

The Four Box Model Questioned -- The Lawyers Panic.

During the Spring of 1984, newspaper columnist Jack Anderson obtained a copy of the Vetter Memo. According to the ANDERSON ARTICLE, *supra,* Menaker telephoned when he discovered that Anderson had the memorandum and attempted to convince Anderson that the Martin Marietta had all along intended to refund to the government all of the so-called "rebates". According to Anderson, Menaker also claimed that the payments from I.V.I. to Maxim had been unrelated in amount to the commissions received by P.T.I. and I.V.I. in connection with Martin Marietta travel. Menaker allegedly characterized Vetter's memorandum as "overzealous".

As reported by Anderson, Menaker's statements were blatantly wrong. And, because they were exposed as misrepresentations in the Anderson article, Martin Marietta lost the opportunity to effectively defend not only the Four

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[3]/ Such savings were achieved by policing air travel reservations made by company employees. Discount airfares are typically approximately half of regular coach airfares. By controlling the reservation system, Maxim was able to assure that discount fares were utilized whenever they were available.

Box Model but the travel project itself. Moreover, once it appeared that the company had been caught in a lie, it became necessary to find a scapegoat.

Martin Marietta's privilege claim to documents going back to October of 1984 is based in part on the assertion that Menaker allegedly took personal charge of an ongoing audit of Maxim and made it part of his legal investigation two days after the Anderson Article appeared on October 8, 1984. The company filed an affidavit by Martin Marietta's Vice-President David Clous, of Corporate Audit to support this contention. (App 56a-57a). However, Mr. Clous testified before a grand jury in connection with the matter, and his testimony is that it was he who continued to direct the audit through its completion in November of 1984. [4]/

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[4]/ *In re Martin Marietta Corporation*, Testimony of David Clous, Special Grand Jury session of November 21, 1986, at 37-40 *(emphasis supplied)*:

> Q. In connection with the audit work that your people were performing in the September/October time period, who was giving you instructions on what to do or who to talk to?
>
> A. Giving me instructions?
>
> Q. Well, if so. Were instructions given?
>
> A. No. *I was really controlling the audit.* There was a point when Mr. Menaker felt that -- when he asked Karen Berry to come down to Orlando with me, no one was telling anyone who to look at or talk to. We were performing our normal audit procedures associated with this kind of review . . . .
>
> • • •
>
> Q. When did you conclude your work on this matter?
>
> A. Let's see, after the 24th of October meeting in Orlando with Mr. Westfall, we had a meeting at 18th and "K" Street with Frank Menaker on

(continued...)

When the government began its investigation during the Fall of 1984, Menaker and his staff manipulated the situation to maintain the focus on Pollard and off Martin Marietta senior management. Thus, Menaker prevented Department of Defense ("DoD") investigators from talking to Pollard while he continued to work at Martin Marietta. When the investigators insisted that Pollard be produced, Pollard was terminated as an employee, while the company hired outside legal counsel to represent him. Meanwhile, witnesses who supported the company line that Pollard was a "bad apple" were retained on the company payroll, and have been so retained to this day, in the company's stable of paid witnesses.

Martin Marietta's Disclosures and Plea Bargain.

During the period from 1984 through February 17, 1987, the government maintained an investigation of Martin Marietta on two fronts. First, the U.S. Attorney's office in Baltimore

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[4](...continued)

> the 29th to go over the same thing. Westfall and Levins came up and we went over the same dump.
>
> Q. When you say "dump" --
>
> A. I am sorry, the same briefing that was given to us in Orlando that was given to Frank Menaker at "K" Street on the 29th.
>
> * * *
>
> *. . . . From an audit sense, I would say we were done some time in November, late October, early November.*

Karen Berry, whom Vice President Clous refers to as a co-participant, was a Martin Marietta attorney who reported to Menaker. Thus, regardless of whether Clous, Menaker, or someone else was directing the internal investigation, a broad subject matter of attorney client communication and work product was made available to the Government and the Grand Jury. The full transcript of Clous' grand jury testimony will be filed if requested.

convened a grand jury. Second, the Defense Logistics Agency (DLA) considered debarring Martin Marietta from federal contracting. The Defense Criminal Investigative Service ("DCIS") carried out the actual investigation for both. Martin Marietta counsel lobbied on both fronts that any criminal responsibility began and ended with Pollard.

In the proceedings below, Martin Marietta initially took the position in its June 30, 1987 reply, filed in support of its Motion to Quash, that there was only one paper submitted to the government which referred to certain statements -- apparently lawyer-client communications-- of any involved Martin Marietta employee. (App. 50a). Later, Martin Marietta's Opposition to Defendant's Motion to Compel disclosed on October 16, 1987 that yet another similar reference was made. (App. 51a-54a). Martin Marietta denied at that time that *any* witness statements had been disclosed to the government, and the papers referred to were characterized by the company's attorneys as "counsel's version of the conduct in question . . . argument . . . no different from an opening argument made by counsel at a trial."

After reviewing the documents *in camera*, the District Court found that the papers in question constituted proffers made by Martin Marietta counsel to the government disclosing contemporaneously made records of events and interviews conducted with Martin Marietta personnel. (App. 30a-31a). At a hearing just prior to the District Court order, Martin Marietta's attorneys conceded that verbatim quotations from transcripts of interviews with employees were made available to the government (App. 61a-62a).

In addition to the proffers made to the government by Martin Marietta counsel, the company's auditors, who ostensibly were working under the supervision of General Counsel Menaker as part of the legal investigation, testified before a grand jury against Pollard. The grand jury witnesses included Martin Marietta's Vice-President Clous, who claimed in his

affidavit to be working directly under General Counsel Menaker after October 8, 1984. He testified against Pollard before the grand jury on the basis of what he gleaned during the ostensible in-house legal investigation as late as October 24, 1984, well after he was allegedly deputized by Martin Marietta's General Counsel, Menaker. He gave his testimony with the knowledge and apparent approval of Martin Marietta's outside counsel. [5]

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[5] Clous Grand Jury testimony, *supra*, 3-4, 27-28):

> Q. Well, in connection with your right to an attorney you may consult with an attorney before answering any question if you choose to. So you could either be excused to talk to company counsel, or if you wanted to obtain your own attorney you could. Do you understand that?
>
> A. Yes.
>
> Q. In connection with your appearance here today the company attorney, Mr. Beizert [should have been Beizer], has advised me that he wishes to put on the record a statement with respect to the attorney/client privilege. He has asked me to advise you that neither the fact of your appearance here today nor the substance of your testimony will be used by the Government in support of a claim that Martin Marietta Corporation has waived any legal privilege which it may have. Do you understand that?
>
> A. Yes, ma'am.
>
> Q. And you have discussed that with Mr. Beizert, the attorney, before; is that correct?
>
> A. Yes, I have.
>
> * * *
>
> Q. But some time during that time period you came to understand the relationship between the commissions and the payments from I.V.I. to Maxim?
>
> A. I think when I really understood it is when I went to Orlando with Karen Berry (phonetic) in October, I believe it was the 24th we were in Orlando. We had a briefing. Mr.

(continued...)

On December 3, 1986, Martin Marietta came to an agreement with the U.S. Attorney's office under which the Company pleaded guilty to a three count felony information charging mail fraud and false statements. (App 58a-60a). Under the plea agreement Martin Marietta paid a fine of $12,000 and agreed to reimburse the government's $250,000 claimed cost of investigating the case.

The U.S. Attorney's office agreed to hold the plea agreement in abeyance to allow Martin Marietta an opportunity to negotiate an agreement with the Defense Logistics Agency that would avoid debarment from Federal contracting under 48 C.F.R. §9.400 et seq. (App 58a-60a) These negotiations led to an Administrative Settlement Agreement with DLA which was signed on March 9, 1987. Martin Marietta agreed to pay

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[5](...continued)

Levins and Mr. Westfall, Roger Devore, myself and Karen Berry, and it was at that meeting the Mr. Westfall went through about a two hour presentation to Karen Berry, and explained that the documentation was all phoney. That the billings had nothing to do with the past, that there was no correlation at all to anything that they had shown us previously in terms of documentation; it was all fabricated. At that time he had been told to destroy the documents.

We went through the whole thing. That was really the first that we really knew positively that the documentation was a sham.

Q. And that the money was coming to Maxim simply because it was viewed as being Maxim's money or Martin Marietta's money?

A. In terms of the money, I don't know whether the money really got described in terms of what was happening with the money. He basically just went through the whole scenario of the four box model and how all this started and how Mr. Incandella would talk to Pollard about getting checks back and forth. So we didn't really know that positive until he told us on October 24th.

$4.3 million to the government.[6] The company also agreed to institute what has been denoted as an "Integrity Assurance Program", under which Martin Marietta supposedly will police itself in the future.

The Administrative Settlement Agreement provided that a single individual, who was identified by DLA separately as Pollard, would not receive any further funding from Martin Marietta for legal fees and costs. (Ibid). On the other hand, individuals who were later identified by the government as unindicted "co-conspirators", expected to testify against Pollard in this case, were not only allowed unlimited funding for legal fees, but were also were permitted to remain on Martin Marietta's payroll.

The Charges Against Pollard.

On April 7, 1987 Pollard was indicted on one count of conspiracy to defraud and two counts of mail fraud. While the indictment is not totally clear, the object of the alleged scheme is identified as "impairing, obstructing and defeating the lawful governmental functions of the [DCAA] . . . in the determination of costs . . . ." (App. 38a). According to the indictment, the conspiracy and fraudulent scheme continued through November of 1984, a point in time after the completion of Martin Marietta's internal investigation activities which generated the allegedly privileged and work product materials.

The Government realized the savings achieved through centralizing control over travel costs attributable to Martin's Federal contracting business. The indictment against Pollard apparently contends that the Government was also somehow entitled to expropriate Maxim's travel agency earnings as well.

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[6] Maxim's profits in 1983 were only $12,000. The 1984 profits were credited against chargeable overhead expenses well before the Administrative Settlement Agreement was reached.

If any fraud was committed against the Government, it would have involved the active participation of higher level corporate management.[7] Pollard did not communicate with the Government on any contractual matter, and he had no responsibility for reporting to the Government. Since Martin Marietta prevented him from talking to the Government during the investigation, he cannot be accused of lying to the investigators or directly obstructing them. The Court of Appeals explained, "Since Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit of its subsidiary Maxim." (App. 5a).

Evidence that others in Martin Marietta had knowledge of the essential operation of the Four Box Model will negate any inference that Pollard acted with fraudulent intent to stuff dollars into Martin Marietta's coffers behind the backs of its management. This is particularly true of atttorneys reporting directly to Menaker and other senior management. The knowledge of those attorneys will also help establish a defense of good faith reliance upon the advice of counsel. Beyond this, evidence showing that Martin Marietta's attorneys knew that they had reason to doubt the credibility of the evidence they were putting together for the Government against Pollard will help Pollard explain the evidence to be arrayed against

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[7] According to a statement by the U.S. Attorney in a Justice Department press release announcing Martin Marietta's guilty plea (App. __a):

> The evidence in this case revealed that *a series of high-level Martin Marietta executives had involvement in various portions of this scheme* at different times. It is fully appropriate for a corporation to be held accountable for the activities of its employees, especially when senior management either had reason to question certain activities, or failed to supervise, or both. (*Emphasis supplied.*)

him by establishing, in the words of the Court of Appeals, "a defense that Martin Marietta hung him out to dry while protecting its own interest." (App. 5a).

REASONS FOR GRANTING THE WRIT

If this Court were to be persuaded by Martin Marietta that the decisions below applied the waiver doctrine to an unduly broad scope of work product documents and proceeded to modify the judgment below on that ground, Federal and state courts would naturally assume that this Court had given appropriate consideration to the issue of whether the work product doctrine should apply at all in the circumstances of this case. Thus, the granting of this petition in conjunction with Martin Marietta's petition will afford defendant Pollard an appropriate avenue of relief from the judgment below should he prevail on issues that need to be addressed anyway for this Court to consider the ramifications of what Martin Marietta is asking.

Although the scope of the work product privilege and its application when asserted as an obstacle to the presentation of evidence by a defendant in a criminal trial involve important issues, the case arises in the context of a complex factual web which the Court will need to unravel in any event if it grants Martin Marietta's petition. Because the case below is in a pre-trial stage, the record is sparse. Contrary to the protestations in Martin Marietta's petition that the decision will have a broad impact on counsel who try to argue the merits of their case, the facts show that the Company is in a unique predicament of its own making. There is nothing new in the proposition that the holder of an evidentiary privilege cannot use the privileged information as a sword against others and then claim the protection of the privilege as a shield. 8 WIGMORE, EVIDENCE §§ 2327-29; *United States v. Nobles,* 422 U.S. 225, 239-40 (1975).

However, if the Court determines that the issues raised in

Martin Marietta's petition are sufficiently important to justify the commitment of the Court's time and resources, consideration of the following issues are essential to a just determination of the case, in fairness to both the litigants and the broader public which will be affected by any precedent established by the Court's decision.

I. The Sixth Amendment Limits the Authority of the Courts to Apply Work Product Protections In a Manner So as to Place Relevant Evidence Beyond the Reach of a Defendant in a Criminal Trial.

All of Martin Marietta's arguments concerning the scope of the waiver of the protections afforded work product materials necessarily assume that the materials can be lawfully protected from disclosure to a defendant who seeks them as evidence in a criminal case. The Court of Appeals erred in accepting Martin Marietta's treatment of any of these items as privileged from disclosure.

In *Nobles v. United States, supra,* 422 U.S. 225 (1975), none of the justices were disposed to base a holding in the case upon the recognition of limited work product protection as an evidentiary privilege applicable to the evidentiary stage of the trial, and no case in this Court has held so since. Mr. Justice White, in an opinion joined by Mr. Justice Rehnquist, concurred with the result, but would have held that work product protections applied only to pretrial discovery and not to the production of evidence at trials. 422 U.S. at 242 (White, J., Concurring). The majority holding was based upon the narrower ground that any privilege that might have been available to the defendant was lost through waiver. Although the opinion of the Court recognized that "concerns reflected in the work product doctrine" can apply to the evidentiary phase of a trial, it expressly left the delineation of the scope of that doctrine at trial to another day. 422 U.S. at 339.

The recognition of a policy "concern" is many steps re-

moved from the elevation of its status to that of an evidentiary privilege which would justify withholding relevant evidence from the defendant and ultimately the trier of fact. For example, in *Davis v. Alaska,* 415 U.S. 308 (1974), the Court recognized that the State had a strong legitimate interest in protecting the confidentiality of its juvenile court proceedings. Nonetheless, when that policy came into conflict with the right of a defendant in a criminal case to present evidence relevent to his defense, the policy protecting juvenile court records had to yield to the Constitutional right. 415 U.S. at 319.

There are many instances where the application of the work product doctrine even against a defendant in a criminal trial would be consistent with the Constitution. For example, in *Hickman v. Taylor,* 329 U.S. 495 (1947), counsel sought to discover work product of his adversary simply "to help prepare himself to examine witnesses, to make sure he overlooked nothing." 329 U.S. at 516 (Jackson, J, concurring). We submit that a subpoena served by a defendant in a criminal case on a similar justification could be quashed even if it were returnable at trial, since the the constitutional right is one of producing evidence -- not of conducting discovery.

But before Martin Marietta can ask this court to extend *Hickman* and *Nobles* so as to hide under the umbrella of a privilege relevent evidentiary materials needed by a defendant at trial, the question must be asked upon what basis the Court should exercise any such power. Although this Court has often recognized that there may be legitimate policy considerations for creating additional evidentiary privileges, it generally has declined to do so, often citing the potential for conflict with the Sixth Amendment right of defendants in criminal cases to produce relevent testimony. *United States v. Nixon, supra,* 418 U.S. at 711 (unqualified privilege for presidential communications rejected); *Branzburg v. Hayes,* 408 U.S. 665 (1972) (privilege for newsmen's confidential sources rejected); and *Roviaro v. United States,* 353 U.S. 53 (1957); *Smith v Illinois,* 390 U.S. 129 (1968) (informer's privilege held subject to Sixth Amend-

ment rights of criminal defendants).

In *United States v. Burr*, 25 Fed. Cas. 31 (Case No. 14,692d, E.D. Va. 1807), Chief Justice Marshall, sitting as Circuit Justice, stated:

> . . . In the provisions of the Constitution, and of the statute, which give to the accused a right to the compulsory process of the court, there is no exception whatever. The obligation, therefore, of those provisions is general; and it would seem that no person could claim an exemption from them, but one who would not be a witness. At any rate, if an exception to the general principle exist, it must be looked for in the law of evidence
>
> . . . .

25 Fed. Cas at 34. If ever a jurist were tempted to use his authority to create a new evidentiary privilege, surely it would have occurred to the Chief Justice. At that time the independence of this Court was under attack on many fronts, including a narrow vote of acquittal in the Senate in the impeachment trial of Justice Chase, and Marshall's opinions in the *Burr* treason trial reflect his strong reluctance to pick a fight with President Jefferson. At one point he expresses strong regret that he was called upon to decide the issue of requiring the President to respond to a subpoena *duces tecum* because the evidentiary value of the documents in question did not justify the zeal with which Burr's attorneys pursued the cause. 25 Fed. Cas. at 191. Fortunately, the Chief Justice resisted the temptation to create a new privilege for the Chief Executive and was able to decide the matter based upon the laws of evidence as they existed at the time.

Since *Burr*, the Federal Courts have expanded the scope of testimony that a defendant can produce before a jury as a matter of right. Justice Story observed that the right of compulsory process was included in the Bill of Rights in

reaction to the common law rule prohibiting the accused from introducing any witnesses at all in his defense. 3 STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES §§ 1786-1788 (1st ed. 1833). Thus, various common law rules restricting witnesses to testify on the grounds of interest continued to be applied. In *United States v. Reid*, 12 How. 361 (1852), it was held that the rules of evidence in the federal courts were those in force in the various states in 1789. This holding was overruled in *Rosen v. United States*, 245 U.S. 467, 471 (1918), which held that as to Federal courts all witnesses having competent understanding would be permitted to testify, leaving their weight and credibility to the trier of fact. In *Washington v. Texas*, 388 U.S. 14, 22 (1967) the *Rosen* rule was declared Constitutionally required and made applicable to State criminal proceedings through the Fourteenth Amendment. Although the common law as it existed in 1789 no longer defines the outer scope of the testimony available at a criminal trial to a defendant through the exercise of Sixth Amendment rights, no case has ever restricted a such a defendant from presenting evidence in his defense which would be available to him under the common law. The trend has been to expand the right to produce relevant evidence.

The concurring opinion in *Nobles, supra,* demonstrates that the work product privilege arose as a limitation on pretrial discovery in civil cases to prevent abuse of the liberalized discovery available under the relatively recent rules of Federal Civil Procedure. Unlike evidentiary privileges such as the attorney-client privilege, the work product privilege has no basis in the common law, the Constitution or statute. It is only recognized under the authority of Court Rules in the context of pretrial discovery.

Where an evidentiary privilege was recognized under the common law at the time of the Bill of Rights or where it is based upon another Constitutional provision such as the Fifth Amendment, it may be presumed that the Sixth Amendment right of compulsory process was adopted with it in mind. But

if judges are empowered to fashion new rules of evidentiary privilege for policy considerations relating to the functioning of the court system, the Constitutional protection becomes meaningless, no matter how worthy the policy considerations might be. The Bill of Rights was adopted as a protection of individuals against the powers of government, and every branch of government, including the judicial branch, is obligated to function within its limitations. The Sixth Amendment contains the guarantees specifically directed to the power of the judicial branch in a criminal trial, and if new evidentiary privileges are to be created which limit those Consitutional rights, it hardly seems prudent for the judicial branch of government to act alone in adopting them.

The Sixth Amendment right to compulsory process is among several rights included therein to guarantee criminal defendants "a meaningful opportunity to present a complete defense." *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Strickland v. Washington*, 466 U.S. 668, 685-685 (1984); *Crane v. Kentucky,* 476 U.S. 683 (1986). These Sixth Amendment guarantees enforce a basic right of defendants in criminal cases to have the prosecutor's case in counter and "survive the crucible of meaningful adversarial testing." *Crane, supra,* (compulsory process and exclusion of exculpatory evidence); *United States v. Cronic,* 466 U.S. 648, 656 (1984) (effective assistance of counsel). In *Washington v. Texas, supra,* 388 U.S. 14 (1967), the Supreme Court equated in importance the defendant's right to produce his own evidence with the corresponding right to confront prosecution witnesses for the purpose of challenging their testimony (388 U.S. at 19, *emphasis supplied*):

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, *the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies.* Just as an accused has the right to con-

> front the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Evidentiary privileges undermine the search for truth which the Sixth Amendment is designed to foster. *Nixon, supra,* 418 U.S. at 710; *Herbert v. Lando,* 441 U.S. 153, 175 (1979). Such priviliges are not favored. "[E]xceptions to the demand for every man's evidence are not lightly created nor expansively construed, for they are in derogation of the search for truth." *Nixon, supra,* 418 U.S. at 710; *Herbert, supra,* 441 U.S. at 175.

The Court of Appeals decision shows that in the circumstances of this case, all of the evidence at issue was properly sought as competent evidence pursuant to Fed. R. Civ. P. 17(c). That Court violated Pollard's Sixth Amendment rights by denying him complete access to that evidence on the basis of using the work product privilege as an evidentiary privilege rather than as a limitation upon discovery.

II. The Federal Rules of Evidence Limit the Authority of Federal Courts to Create New Evidentiary Privileges.

Fed. R. Evidence 501 codifies the longstanding rule that evidentiary privileges for purposes of admitting evidence in Federal criminal trials must be based upon the Constitution, statutes passed by Congress, court rules, or the common law as interpreted in the courts in the light of reason and experience. *Trammel v. United States,* 445 U.S. 40 (1980).

The plain language of this rule shows that the Court of Appeals erred by applying the work product doctrine as an evidentiary privilege to limit the ability of a defendant in a criminal case to secure evidence relevent to his defense. If Congress had intended to give the Courts free reign to create new evidentiary privileges, it could have stated so. The process of interpreting the common law in light of reason and

experience allows the Court latitude to set aside common law rules that no longer make sense in light of modern conditions. However the tie to common law rules strongly implies that any laws of privilege enforced in the Federal courts should have some statutory basis or historic basis in the common law.

Trammel, supra, illustrates the principle that there is a basis to modernize common law rules of privilege in light of modern conditions without creating new privileges unknown to the common law or statute. In that case the Court set aside the absolute privilege of a defendant to prevent his spouse from testifying against him on the grounds that the privilege was established to preserve family values, that such concerns were traditionally committed to the States, and that application of such a privilege in federal courts made little sense under modern conditions in light of the fact that most States were no longer applying it.

The creation of evidentiary privileges previously unknown to the common law is quite a different matter. The desire to conduct one's work in privacy under the umbrella of a privilege from subpoena is by no means limited to lawyers and those who assist in preparing for trials. University professors, union leaders, business leaders, politicians, bureaucrats, journalists, scientists, stock brokers, real estate salesmen and auto mechanics all have legitimate arguments that their work is important and that they would be able to do it better if they had some assurance of privacy from litigants, at least with respect to certain aspects of it. The assignment of additional evidentiary privileges to lawyers or to anyone else involves a sensitive judgment as to the relative importance of the need for privacy balanced against the need for evidence. In a pluralistic society such as ours, such judgments are committed to the legislative branch, at least in the first instance.

If the Court determines that the needs for confidentiality in trial preparation are so great that the work product doctrine should be elevated to an evidentiary privilege, appropriate

avenues exist for the Court to propose to Congress amendments to the Rules used in Federal Courts. For the judicial branch to act on its own in this respect ignores the proper role of Congress in any such determination.

As shown in *Nobles, supra* (White, J., concurring), the work product doctrine is unknown to the common law as an evidentiary privilege to determine admissibility of evidence at trial. The Court of Appeals violated FED. R. EVID. 501 by applying it as an evidentiary privilege so as to potentially deny Pollard access to relevent and otherwise admissible evidence.

III. The Policies Underlying the Work Product Doctrine Require the Production of the Evidence Withheld by the Court of Appeals.

The work product doctrine was never intended, even in civil discovery, to bar a party from access to otherwise competent evidence. When the Federal Rules of Civil Procedure were first adopted, a party was, for the first time, entitled to discover not only evidence itself, but all types of nonprivileged information as to the existence or whereabouts of facts. *Hickman v. Taylor, supra,* 329 U.S. at 501. The plaintiff in *Hickman* sought discovery of witness statements, not for their evidentiary value, but "to help prepare himself to examine witnesses and to make sure that he had overlooked nothing." 329 U.S. at 513. In overruling such use of discovery, the Court took pains to point out that the subject matter was *not* privileged. 329 U.S. at 510. Instead, the Court concluded that the plaintiff in that case wanted the statements for preparation only and should do his own work rather than utilizing that of his adversary. Thus, rather than raising any issue of privilege, the question was whether the request "falls outside the arena of discovery". 329 U.S. at 510.

But where work product has independent evidentiary value, there is no privilege from disclosure. For example, a member of a defense team who witnesses an out-of-court statement of

statement of someone who later testifies at trial in a contradictory fashion becomes a witness to a relevant and admissible event once that witness testifies. *Nobles, supra*, 422 U.S. at 250-51 (White, J., concurring). *Jencks v. United States,* 353 U.S. 657 (1957) requires the prosecution in a criminal case to turn over any statements of a witness it has in its possession once the witness testifies at trial, even in the absence of any attempt by the prosecutor to use such documents at trial. *Goldberg v. United States,* 425 U.S. 94 (1976), lays to rest any contention that the application of any work product doctrine applicable to criminal cases through *Nobles* bars the defense from access to this evidence.

In the usual case where the work product doctrine applies, the attorney comes into the picture after a transaction is completed and gains exposure to information only as part of the process by which he prepares a case for litigation. In this case, however, Martin Marietta attorneys were themselves actors in the transactions which give rise to the material issues in the case. This is not the case here.

As the Court of Appeals explained, Pollard is accused of a crime because the Government contends it was somehow misled by Martin Marietta. The time period of that conspiracy alleged in the indictment includes Martin Marietta's so-called internal investigation which is the basis of its work product assertion. Although the Government has chosen to single out Pollard as the only individual indicted, it has stated that upper management was heavily involved in the alleged conspiracy. Pollard contends the so-called internal investigation was actually an effort to manipulate the evidence so as to portray him as the only bad apple in the bushel to insulate upper management from prosecution -- an effort which did not end at any particular time. Martin Marietta attorneys set up the Four Box Model in the first place. Martin Marietta attorneys did all the talking to Jack Anderson which got the Company into trouble. Martin Marietta attorneys did all the talking to the Government. It just so happens that on the facts of this case, the

mental processes of these attorney-actors are highly material to the central question of just who was misleading who.

There is nothing in the work product doctrine which gives an attorney a general immunity from testifying. An attorney can be called as a witness if he observes a traffic accident, and most certainly he can be called as a witness if he is alleged to have caused it. What is truly remarkable here is that Martin Marietta has made no effort to insulate the attorney-actors, who include its General Counsel and staff, from the attorneys who were conducting the so-called legal investigation. Thus, Frank H. Menaker continues to appear of counsel on Martin Marietta's Petition for a writ of certiorari in this Court. Thus, considerable confusion has been generated on this record as to what Martin Marietta's legal investigation was, when it began, and who was participating in it as distinguished from the transactions which were its subject matter. This confusion is not Pollard's doing and cannot be the basis to deny him access to evidence material to his defense.

The work product doctrine is not absolute. Even in the absence of waiver, a party is entitled to show "good cause" for discovery of information, such as when access to the files of an adversary is the only avenue of obtaining relevant evidence. Unfortunately, the Court of Appeals decision is not clear as to what the District Court should do under its mandate if good cause[8] is established by Pollard for access to what the Court of Appeals erroneously defined as work product materials. In

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[8] Thus, the Court stated in *Hickman v. Taylor, supra*, 329 U.S. at 511:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and nonprivileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

any event, the District Court personally reviewed the documents *in camera* while the Court of Appeals based its decision on representations of Martin Marietta counsel. The District Court gave Martin Marietta more than ample opportunity to establish the basis for its work product claim on the record below. There is no reason to require the District Court to revisit the issue again.

CONCLUSION

In the event that this Court determines to grant Martin Marietta's petition for a writ of certiori, then this cross petition should be granted as well. The judgment of the Court of Appeals should be reversed, and the case should be remanded with directions to reinstate the District Court's judgment holding the Martin Marietta Corporation in contempt.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-3648

IN RE MARTIN MARIETTA CORPORATION,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff

versus

WILLIAM C. POLLARD,
Defendant-Appellee.

Appeal from the United States District Court
for the District of Maryland, at Baltimore.
Joseph H. Young, Senior District Judge—(CR-87-142-Y)

Argued: April 8, 1988 Decided: September 6, 1988

Before WINTER, Chief Judge, and MURNAGHAN and ERVIN, Circuit Judges.

Brian Christian Elmer (Richard L. Beizer, Alan W. H. Gourley, Pauline E. Waschek, CROWELL & MOR-

ING; George Beall, MILES & STOCKBRIDGE; Frank H. Menaker, Jr., Jay A. Brozost, MARTIN MARIETTA CORPORATION on brief) for Appellant. Robert Harley Bear (James S. Maxwell, MAXWELL & BEAR on brief) for Appellee.

MURNAGHAN, Circuit Judge:

William C. Pollard, a former employee of Martin Marietta Corporation (Martin Marietta), is under indictment, returned April 7, 1987, by a grand jury of the District of Maryland on three counts. Count I alleges a conspiracy to defraud the Department of Defense (DOD), Counts II and III allege mail fraud. Pollard is charged with operating a scheme to characterize improperly travel cost rebates paid by travel agencies PTI and its subsidiary IVI (companies independent of Martin Marietta) to Maxim, a subsidiary of Martin Marietta, as fees rather than credits against travel costs. The overall effect was that Martin Marietta could overstate the costs for which it received reimbursement by the DOD.

On June 1, 1987, Pollard, under Fed. R. Crim. P. 17(c), subpoenaed Martin Marietta for the production of fifteen categories of documents. On June 12, 1987, Martin Marietta moved to quash. On July 2, 1987, the district court denied the motion to quash but also ruled that the subpoena was overly broad. The court limited the subpoena to uncontested items until the defense established a need for particularized items. On September 9, 1987, Pollard limited the scope of the contested items to six categories. At a hearing held the next day the district court allowed Martin Marietta several weeks to determine what documents it would voluntarily produce. On October 1, 1987, Martin Marietta agreed that it would produce the documents responsive to two of the six categories, would produce some of the documents requested under a third category, and had no documents requested under a fourth category. It refused to produce any items in the other two categories. Thus, three categories of documents remained in dispute. They were:

1. *Audit Papers.* Martin Marietta's corporate internal audit reports, workpapers and related supporting documentation (including internal memoranda and internal and external correspondence), covering and audits of Martin Marietta's subsidiary Maxim, and its relationship to travel companies IVI and PTI. [This is the category for which Martin Marietta made selected production.]

2. *Witness Statements.* Notes, transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Levins, John Rayburn, Peter Warren and James Simpson concerning the relationship of Martin Marietta, Maxim, IVI and PTI.

3. *Administrative Settlement Agreement Materials.* All correspondence and notes of unwritten communications to or from Martin Marietta and the United States Gvernment related to the Administrative Settlement Agreement between the company and the Defense Logistics Agency executed by the company on January 31, 1987.

On October 15, 1987, Pollard moved for an order to compel production of the items withheld by Martin Marietta. At Martin Marietta's request, the court committed itself to a two-step procedure: first, to require production of the documents at issue *in camera*; and second, to give the company another opportunity, after the court reviewed the documents, to argue against their production to Pollard. In the course of that procedure, Martin Marietta acknowledged that portions of some documents it sought to withhold had been earlier quoted in disclosures made by it to the Government, either or both the United States Attorney and the Defense Logistics Agency, part of the Department of Defense.

The district court ordered production of the documents at issue, with the exception of audit papers that had

already been made available to the defense, and certain documents relating to the Administrative Settlement Agreement that the court determined after its *in camera* review to be irrelevant. In its accompanying memorandum, the court described its basis for ordering the disclosure of the materials by category. A contempt order was issued when Martin Marietta failed to comply with the order of production.

Rule 17(c) implements the Sixth Amendment guarantee that an accused have compulsory process to secure evidence in his favor. *California v. Trombetta*, 467 U.S. 479, 485 (1984). Enforcement of a Rule 17(c) subpoena is governed by the standards established in *United States v. Nixon*, 418 U.S. 683 (1974). A party seeking pretrial production of documents must demonstrate (1) relevancy, (2) admissibility, and (3) specificity with respect to the documents. *Id.* at 700.

The district court correctly noted that *Nixon* requirements and then found that Pollard met them. Martin Marietta argues that the court misapplied the *Nixon* requirements. Its chief objection is that it thinks that the district court misapplied the admissibility criterion by improperly using a broad civil discovery standard rather than the narrower criminal evidentiary standard.

Martin Marietta has a heavy burden to meet on appeal.

> Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).

Nixon, 418 U.S. at 702 (emphasis in original).

We turn to the three *Nixon* requirements. While Rule 17(c) is limited to evidentiary materials, that is not to say that the materials subpoenaed must actually be used in evidence. It is only required that a good faith effort be made to obtain evidence. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 219-20 (1951).

All the efforts to obtain material that Pollard makes come in a good faith effort to obtain evidence and the admissibility criterion of the *Nixon* requirements is thereby met. He seeks results of an internal audit. Since Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit of its subsidiary Maxim. The audit is clearly of evidentiary value. Pollard seeks interview notes, transcripts and electronic recordings concerning the audit. They are of evidentiary value. Pollard seeks correspondence and notes relating to the Administrative Settlement Agreement between DOD and Martin Marietta. They are of evidentiary value to Pollard's defense that he was made a scapegoat. Part of that administrative settlement was agreement by Martin Marietta no longer to fund Pollard's defense. Pollard was not indicted until after Martin Marietta had solved its problems: It pled guilty to criminal charges and administratively settled with the DOD. A subpoena of the administrative agreements is at least a good faith effort to acquire evidence by Pollard for a defense that Martin Marietta hung him out to dry while protecting its own interest.

The district court applied the correct standard for the second *Nixon* requirement: specificity with respect to the documents requested. It found that the requested materials: results of an internal audit, interview notes, transcripts, electronic recordings and correspondence relating to the Administrative Settlement Agreement between Martin Marietta and the DOD, were described with sufficient specificity. In that regard, we note that Pollard

had, at the district court's order, greatly limited the scope of documents sought.

While the district court did not make detailed findings regarding relevancy that requirement, the third of the three *Nixon* requirements, was met. Further, while the Supreme Court in *Nixon* established relevancy and admissibility as separate requirements, it seems that admissibility subsumes relevancy since one aspect of admissibility is relevance.

The district court concluded that the *Nixon* requirements were met. That conclusion was not an abuse of discretion and will not be disturbed. *Nixon*, 418 U.S. at 702.

Martin Marietta next argues that, even if the documents were within the scope of a Rule 17(c) subpoena, they are protected from disclosure by either or both of the attorney-client and work-product privileges. A subpoena *duces tecum* should be quashed or modified if it calls for privileged matter. C. Wright, Federal Practice & Procedure Criminal 2d § 275, at 162-163. Pollard argues that Martin Marietta in settling with the government both as to criminal charges and in the Administrative Settlement Agreement with the DOD impliedly waived the attorney-client and work-product privileges. There can be no dispute but that otherwise privileged materials were disclosed to the United States Attorney and the DOD. The issue is the extent of the implied waiver thereby created.

Implied waiver nullifies a privilege when disclosure of a privileged communication has vitiated confidentiality. Unlike express waiver which allocates control of the privilege between parties to the communication, implied waiver allocates control of the privilege between the judicial system and the party holding the privilege. Comment, *Developments—Privileged Communications*, 98 Harv. L. Rev. 1450, 1629-30 (1985).

Martin Marietta argues for application of a limited implied waiver as to both privileges. Most courts continue to state the rule of implied waiver in absolute form—any disclosure of a confidential communication outside a privileged relationship will waive the privilege as to all information related to the same subject matter. That is commonly referred to as subject matter waiver as opposed to limited waiver for which Martin Marietta argues. However, competing policy concerns, such as facilitating the settlement of litigation, permitting full cooperation among joint defendants, expediting discovery and encouraging voluntary disclosure to regulatory agencies have led courts to carve out exceptions to the purportedly absolute rule of waiver. Martin Marietta argues that an exception should be found in the present case so as to limit the waiver to the information that it actually disclosed to the government (copies of which Pollard has been provided) rather than implying a waiver as to all materials on the same subject as those provided the government.

The Fourth Circuit has previously rejected the limited waiver concept as to the attorney-client privilege and as to non-opinion work-product. We have embraced the limited waiver concept as to opinion work-product. Since, in the present case, we are unsure whether the documents ordered produced include opinion work-product, we remand the case to the district court to consider whether opinion work-product materials were included in the materials ordered produced. We agree that a subject matter waiver has been worked as to the attorney-client privilege and as to non-opinion work-product.

Attorney-Client Privilege.

The Fourth Circuit has not embraced the concept of limited waiver of the attorney-client privilege. It has held that if a client communicates information to his attorney with the understanding that the information will be revealed to others, that information as well as

" 'the details underlying the data which was to be published' " will not enjoy the privilege. *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984) (quoting *In re Grand Jury Proceedings*, 727 F.2d 1352, 1356 (4th Cir. 1984) (quoting *United States v. Cote*, 456 F.2d 142, 145 (8th Cir. 1972))).

The District of Columbia Circuit has had frequent occasion to consider the waiver resulting from disclosure of privileged material to the federal government and has likewise not embraced the concept of limited waiver as to the attorney-client privilege. *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984). In that case Tesoro Petroleum provided the Securities and Exchange Commission (SEC) with information regarding illegal foreign bribes in return for more lenient treatment from the SEC. Tesoro shareholders brought a derivative suit and sought the documents in discovery. The court rejected the limited waiver argument.

A similar result is required here. In September and November 1986 Martin Marietta submitted to the United States Attorney a Position Paper describing why the company should not face indictment. The paper contains assertions: "of those consulted within the Company all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud" and "there is no evidence, testimonial or documentary, that any company officials in the meeting [of November 17, 1983] except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract." Pollard's subpoena seeks in category 1 the audit papers and in category 2 witness statements from which the Position Paper statements were derived. Like the Fourth Circuit case of *In re Grand Jury Proceedings*, the Position Paper as well as the underlying details are no longer within the attorney-client privilege. Similarly and more clearly the disclosures made to the Defense Logistics Agency in the

Administrative Settlement Agreement and sought in category 3 are not privileged and are subject to disclosure under the subpoena. All that is sought with regard to the Administrative Settlement Agreement is the actual communications between Martin Marietta and the DOD. Thus, all the materials at issue in the present case are either information revealed to others or details underlying the data that was published. Accordingly, they do not enjoy an attorney-client privilege from disclosure under a Rule 17(c) subpoena.

The Work-Product Privilege.

While the attorney-client privilege is intended to promote communication between attorney and client by protecting client confidences, the work-product privilege is a broader protection, designed to balance the needs of the adversary system: promotion of an attorney's preparation in representing a client versus society's general interest in revealing all true and material facts to the resolution of a dispute. *United States v. Nobles*, 422 U.S. 225, 238 (1975); *In re Subpoena Duces Tecum*, 738 F.2d at 1371 (citing *Hickman v. Taylor*, 329 U.S. 495, 509-12 (1947)).

Nobles made clear that the work-product doctrine not only applies in criminal cases, but that it plays an even more vital role in criminal than in civil cases. *Id.* at 238. Nonetheless, the Court stated that it is only a qualified privilege subject to waiver. The signal feature of the implied waiver in that case, and in the one at bar, is the attempt to make testimonial use of work-product materials.

> What constitutes a waiver with respect to work-product materials depends, of course, upon the circumstances. Counsel necessarily makes use throughout trial of the notes, documents, and other internal materials prepared to present adequately his client's case, and often relies on them in examining wit-

> nesses. When so used, there normally is no waiver. But where, as here, counsel attempts to make a testimonial use of these materials the normal rules of evidence come into play with respect to cross-examination and production of documents.

Id. at 239 n. 14.

In *Nobles* defense counsel hired a private investigator after the alleged crime, a bank robbery, had taken place. The investigator interviewed two witnesses, a bank teller and customer, both of whom were present during the alleged robbery, and preserved the essence of those conversations in a written report. At trial, the witnesses testified for the prosecution. Defense counsel relied on the investigator's report during their cross-examinations. Both witnesses denied having made statements to the investigator that cast doubt on their trial testimony. The Supreme Court indicated that up to that point no waiver of the work-product privilege was worked. *Nobles*, 422 U.S. at 239.

Defense counsel's next trial tactic changed that conclusion. Counsel sought to put the investigator on the stand and contrast his recollection of the contested statements with the recollections of the two witnesses. The trial court ruled that a copy of the entire portion of the investigator's report dealing with the statements would have to be submitted to the prosecution for inspection at the completion of the investigator's testimony. The defense chose not to disclose the report and suffered the consequence of not being allowed to have the investigator testify. The Supreme Court agreed with the trial court's ruling. The Court indicated that defendant, "by electing to present the investigator as a witness, waived the [work-product] privilege with respect to matters covered in his testimony." *Id.* at 239.

After the Court indicated that testimonial use of work-product implies a waiver, it spoke to the scope of that

waiver and rejected an argument for limited implied waiver such as that advanced by Martin Marietta in the present case. The Court indicated that the waiver created by testimonial use means that the normal rules of evidence with respect to cross-examination and production of documents apply; it did not simply indicate that the privilege was lost as to the matters actually disclosed.

Martin Marietta argues that the waiver should be implied only as to those work-product materials actually disclosed. The *Nobles* court did not agree.

If the Court had accepted an argument akin to Martin Marietta's in the *Nobles* case, it would have concluded that the privilege would be waived only as to the investigator's testimony on the witness stand (what was actually disclosed) rather than ruling that the waiver would encompass the entirety of the report from which the disclosures were drawn (data underlying the disclosure). Thus, if it had accepted the notion of implied waiver it would have found the district court in error since waiver should have applied only to the testimony, not the report.

We considered *Nobles* and the scope of an implied waiver of the work-product privilege in *Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1222-23 (4th Cir. 1976). We bifurcated work-product into opinion and non-opinion work-product. We noted that *Nobles* dealt with non-opinion work-product and that *Nobles* had held that subject matter waiver applies to non-opinion work-product when testimonial use of non-opinion work-product is made.

We apply those principles of *Nobles* as interpreted by *Duplan* to the present case. Here, testimonial use has been made of non-opinion work-product. That was the factual situation in *Nobles*. We conclude that disclosure by Martin Marietta to the federal government, the

United States Attorney and the DOD, when the government and Martin Marietta were adversaries constitutes testimonial use. Three factors are important in that conclusion. First, we note that the federal government's and Martin Marietta's interests were decidedly adverse during the proceedings at issue. Martin Marietta faced criminal charges in the one instance and debarment from federal contracting in the other. We do not decide the issue of disclosures in less adverse circumstances like regulatory disclosures. Second, we note that Martin Marietta made an express assurance of completeness of its disclosure to the United States Attorney. Third, we note that the disclosures were made in a direct attempt to settle active controversies between Martin Marietta and the United States Attorney and the DOD. Not only was there not community of interest, the disclosures were made under promise of completeness to induce an adversary to settle. *See In re Doe*, 662 F.2d 1073, 1081 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982).

Thus, Martin Marietta has impliedly waived the work-product privilege as to all non-opinion work-product on the same subject matter as that disclosed. The disclosure of Martin Marietta was made broad by its express assurance of completeness of its disclosure to the United States Attorney, so that the subject matter of the disclosure and the waiver is comprehensive, and includes all of the company's non-opinion work-product relating to the investigation that it conducted.

Counsel for Martin Marietta made oral representations in appellate argument that the district court's order encompassed materials involving pure legal theory or opinion. We realize that non-opinion work product necessarily will be reflective of a counsel's approach, but we think a distinction can be made between non-opinion work product, which may nevertheless be ordered produced if counsel has waived work product protection, and pure mental impressions severable from the underlying data and arguably not subject to subject matter

waiver. We understood counsel for Martin Marietta to represent that the district court's order encompassed items of pure opinion or legal theory that may be severed from the underlying information.[1] In light of these representations, we feel that it is incumbent upon us to decide a point of law we reserved in *Duplan*: whether subject matter waiver "applies with equal vigor to opinion work product." 540 F.2d at 1223 n.6. We hold that the doctrine does not apply to such materials.

We think that when there is subject matter waiver, it should not extend to opinion work product for two reasons.

First and most generally, opinion work product is to be accorded great protection by the courts. While certainly actual disclosure of pure mental impressions may be deemed waiver, and while conceivably there may be indirect waiver in extreme circumstances, we think generally such work product is not subject to discovery. While, as we recognized in *Duplan*, the Supreme Court's reasoning in *Nobles* necessarily implies that the privilege derived from the work product doctrine is not in all cases absolute, *see Duplan*, 540 F.2d at 1223, the plain language of Fed. R. Civ. P. 26(b)(3) suggests especial protection for opinion work product:

> In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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[1] Counsel for Pollard conceded in oral argument before this Court that it was not his original intent to subpoena documents containing, hypothetically, marginal notes written by an attorney to convey his own mental impressions or thoughts, distinct from, for example, notes and memoranda summarizing interviews with employees concerning the audit, but that the district court's order encompasses such statements, and that he now seeks them under the district court's order.

Secondly, the underlying rationale for the doctrine of subject matter waiver has little application in the context of a pure expression of legal theory or legal opinion. As we noted in *Duplan*, the Supreme Court applied the concept in *Nobles*:

> where a party sought to make affirmative testimonial use of the very work product which was then sought to be shielded from disclosure.

540 F.2d at 1223. There is relatively little danger that a litigant will attempt to use a pure mental impression or legal theory as a sword and as a shield in the trial of a case so as to distort the factfinding process. Thus, the protection of lawyers from the broad repercussions of subject matter waiver in this context strengthens the adversary process, and, unlike the selective disclosure of evidence, may ultimately and ideally further the search for the truth.

We therefore vacate the district court's order as to all items for which work product protection was claimed, and remand with instructions that the district court once again review these documents *in camera*. We think it proper for the district court, in the first instance, to conduct such a review. In so ruling, we recognize that the line between opinion and non-opinion work product can be a fine one.[2] But what should not be ordered to be

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[2] The distinction is recognized implicitly in Fed. R. Civ. P. 26(b)(3) and in practice should not present great theoretical difficulties. For example, in the instant case, Martin Marietta having quoted from some audit interviews, the transcript of these interviews has been waived under the broad doctrine of subject matter waiver. Similarly, work product protection has been waived as to most of the internal notes and memoranda on these interviews which, by way of summarizing in substance and format the interview results, Martin Marietta used as the basis of its disclosure to the government on its audit results. These are evidentiary materials, from which Pollard hopes to adduce evidence supporting his scapegoat theory. However, in disclosing such results, Martin Marietta apparently would not disclose nor would intend to dis-

disclosed are pure expressions of legal theory or mental impressions.

On remand, it will of course be Martin Marietta's burden of proof to demonstrate that the documents included in the district court's order include opinion work product. Martin Marietta must provide specific and detailed indications of where such work product is located in the documents in order to enable the district court to conduct an expeditious review and redact pure legal theories, impressions, or opinions in those documents or portions thereof that Martin Marietta has not actually disclosed to the government or others.

We therefore affirm the district court's order as to all documents for which work product protection was not claimed, and vacate as to all documents for which the work product privilege was claimed for further proceedings consistent with this opinion.[3]

VACATED AND REMANDED.

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close, hypothetically, marginal notations on such documents such as: "This person does not appear to be credible; let's not call him as a witness if we have to go to trial on this one." Such an expression of legal opinion, thus detached from the data which Martin Marietta did disclose, would not be subject to subject matter waiver.

[3] One final matter remains. The United States Attorney's office has written the court about the Position Paper presented to it. That office wants, regardless of outcome of the present case, to disclose it to Pollard, and asks that our order include permission for the government to do so. That decision of the United States Attorney is independent of the case at bar and we decline to render an opinion to the United States Attorney on whether to disclose it.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-3648

IN RE: MARTIN MARIETTA CORP.,
Appellant,

UNITED STATES OF AMERICA,
Plaintiff,

v.

WILLIAM C. POLLARD,
Defendant-Appellee.

On Petition for Rehearing with Suggestion
for Rehearing In Banc

[Filed Oct. 14, 1988]

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Chief Judge Winter and Judge Ervin.

For the Court

/s/ John M. Greacen
JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MEMORANDUM AND ORDER

On November 13, 1987, the Court ordered Martin Marietta Corporation to disclose specific documents to counsel for William C. Pollard, no later than November 16, 1987, at 10:00 a.m. Martin Marietta Corporation has willfully disobeyed the Court's deadline for producing these discovery items. Therefore, pursuant to 18 U.S.C. § 401(3), it is this 16th day of November, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That Martin Marietta Corporation BE, and the same IS, hereby HELD in civil contempt;

2. That, pending compliance with the Court's Order of November 13, 1987, Martin Marietta Corporation BE, and the same IS, hereby FINED the sum of one thousand ($1,000) dollars per day until compliance; and

3. That a copy of this Memorandum and Order be mailed to counsel for the government, defendant, and Martin Marietta Corporation.

/s/ Joseph H. Young
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

ORDER

In accordance with the attached Memorandum, it is this 13th day of November, 1987, by the United States District Court for the District of Maryland, ORDERED:

1. That Martin Marietta Corporation BE, and the same hereby IS, directed to disclose to counsel for William C. Pollard, no later than Monday, November 16, 1987, at 10:00 a.m., the following items:

(a) the company's corporate internal audit reports, workpapers, and related supporting documentation covering the 1984 Maxim/IVI/PTI audit which have not been previously disclosed to defendant;

(b) transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Ferris [sic], John Rayburn, Peter Warren, and James Simpson concerning the 1984 Maxim/IVI/PTI audit and Maxim's relationship to IVI and PTI; and

(c) correspondence and notes of unwritten communications related to the administrative settle-

ment between the company and government in connection with the Maxim/IVI/PTI matter, excluding the Brozost material.

2. That a copy of this Memorandum and Order be provided to counsel for the government, defendant, and Martin Marietta Corporation by 2:00 p.m., Friday, November 13, 1987.

/s/ Joseph H. Young
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MEMORANDUM

Presently before the Court is a motion to compel discovery. After receiving written memoranda, hearing counsel, and reviewing documents *in camera*, the matter is now ready for resolution.

Defendant William C. Pollard seeks disclosure of three categories of documents from Martin Marietta Corporation:

(1) the company's corporate internal audit reports, workpapers, and related supporting documentation covering the 1984 Maxim/IVI/PTI audit;

(2) transcripts and electronic recordings of interviews with and statements by William Pollard, Richard Westfall, Gregory Ferris [sic], John Rayburn, Peter Warren, and James Simpson concerning the 1984 Maxim/IVI/PTI audit and Maxim's relationship to IVI and PTI; and

(3) correspondence and notes of unwritten communications related to the administrative settlement between the company and government in connection with the Maxim/IVI/PTI matter.

Martin Marietta Corporation ("MMC" or the "Company") challenges Pollard's discovery request on several

grounds. First, it argues that it has already provided defendant with the internal audit report and supporting documentation relating to the Company's audit of Maxim requested in item 1 above; MMC notes that it has only withheld materials generated after it anticipated litigation concerning this matter.[1] MMC also contends that the notes, transcripts, and electronic recordings of interviews sought under item 2 above are inadmissible hearsay which do not fall within any of the recognized exceptions. Finally, the Company asserts that its correspondence and notes regarding MMC's negotiation of the Administrative Settlement Agreement requested under item 3 above are irrelevant to Pollard's conduct which is on trial.

Pollard contends that the materials sought are "evidentiary, highly relevant, and essential for defendant to properly present his case." The indictment charges Pollard with conspiring to defraud the Department of Defense by "impeding, impairing, obstructing and defeating the lawful governmental functions of the Defense Contract Audit Agency (DCAA)." Since defendant did not have any direct contact with DCAA auditors, he is essentially charged with obstructing MMC's corporate internal audit of its subsidiary Maxim, and its relationship to travel companies IVI and PTI. Thus, defendant seeks complete disclosure of the audit in question in order to properly defend himself.

Pollard also contends that the interview notes, transcripts, and electronic recordings are also discoverable because they may constitute evidence of a company-wide conspiracy to defraud the Defense Department, as well

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[1] In a November 5, 1987 letter, the Company asserts that all materials in item 1 (except folder 1) has [sic] already been made available to Pollard. It objects to further disclosure of the particular set of documents submitted to the Court because it would reveal the "mental process" of the Company's representatives and is opinion work product.

as identify the members of such conspiracy. Finally, defendant contends that the correspondence and notes relating to the Administrative Settlement Agreement place his prosecution in proper context since the government named him defendant after the Company pled guilty to felony charges and the government had given other individuals immunity for their cooperation.

The initial issue involved is whether this discovery is permissible under Rule 17(c) of the Federal Rules of Criminal Procedure. The United States Supreme Court has provided:

> [I]n order to require production prior to trial, the moving party must show: (1) that the documents are evidentiary and relevant; (2) that they are not otherwise procurable reasonably in advance of trial by exercise of due diligence; (3) that the party cannot properly prepare for trial without such production and inspection in advance of trial and that the failure to obtain such inspection may tend unreasonably to delay the trial; and (4) that the application is made in good faith and is not intended as a general 'fishing expedition.'
>
> Against this background, [the moving party], in order to carry his burden, must clear three hurdles: (1) relevancy; (2) admissibility; (3) specificity.
>
> * * * *
>
> Enforcement of a pretrial subpoena *duces tecum* must necessarily be committed to the sound discretion of the trial court since the necessity for the subpoena most often turns upon a determination of factual issues. Without a determination of arbitrariness or that the trial court finding was without record support, an appellate court will not ordinarily disturb a finding that the applicant for a subpoena complied with Rule 17(c).

United States v. Nixon, 418 U.S. 683, 699-700, 702 (1974) (citations omitted).

The Court is satisfied that Pollard has satisfied the *Nixon* requirements for discovery pursuant to Rule 17(c). Thus, the critical inquiry is whether MMC may successfully assert the attorney-client privilege and work product doctrine to protect this disputed material from discovery.

The attorney-client privilege consists of the following elements:

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.

United States v. Board of Education of Chicago, 610 F. Supp. 695, 701 (N.D. Ill. 1985) (quoting 8 Wigmore § 2292). In the corporate context, the United States Supreme Court has applied the attorney-client privilege to protect information obtained in an internal company investigation from compelled disclosure where:

> (1) The communications at issue were made by [corporate] employees to [corporate] counsel . . . acting as such, at the direction of corporate superiors in order to secure legal advice from counsel; and
>
> (2) The communications concerned matters within the scope of the employees' corporate duties, and the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice; and
>
> (3) [T]he communications were considered 'highly confidential' when made, and [were] kept confidential by the company.

Upjohn Co. v. United States, 449 U.S. 383, 394-95 (1981). MMC argues that the interview notes, transcripts, and electronic recordings are protected by the attorney-client privilege because the Company complied with the requirements of *Upjohn*.

Pollard contends that MMC has attempted to use the attorney-client privilege to "manipulate and select the disclosure of the information gleaned during the company audit, for self-serving purposes" by having some witnesses give their statements to an auditor and having select other witnesses give their statements to the company's legal staff for "discrete and legally protected purpose[s]." Moreover, defendant argues that MMC has waived the attorney-client privilege by disclosing information designed to place blame on Pollard to the government which it now attempts to withhold from Pollard.

The Company also argues that the information sought in items 1 through 3 above is protected under the work product doctrine. The work product doctrine is codified in Rule 26(b)(3) of the Federal Rules of Civil Procedure, which provides in pertinent part:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

MMC argues that Pollard seeks the most sensitive work product, namely counsel's mental impressions, conclusions, opinions, and legal theories regarding future litigation. The work product doctrine prohibits such disclosure. *Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947). Once again, however, Pollard argues that MMC waived its work product privilege by making selective disclosures of the disputed information to the government while negotiating the Administrative Settlement Agreement.

The United States Court of Appeals for the District of Columbia has provided most of the case law addressing waiver of the attorney-client privilege and the work product doctrine. Its most recent case on this issue, *In re Subpoenas Duces Tecum*, 738 F.2d 1367 (D.C. Cir. 1984), provides a good summary of the court's previous holdings, most particularly, *United States v. American Telephone & Telegraph*, 642 F.2d 1285 (D.C. Cir. 1980); *Permian Corp. v. United States*, 665 F.2d 1214 (D.C. Cir. 1981), and *In re Sealed Case*, 676 F.2d 793 (D.C. Cir. 1982), and is applicable to the case *sub judice*. In *Subpoenas Duces Tecum*, Tesoro Petroleum Company provided the Securities and Exchange Commission (SEC) information regarding its alleged illegal payments to foreign officials under a "voluntary disclosure program," whereby the SEC provided Tesoro more lenient treatment and the chance to avoid formal investigation and litigation. 738 F.2d at 1368-69. Tesoro then attempted to assert the attorney-client and work product privileges to prevent having to disclose this information to stockholders bringing a derivative action against the company. *Id.*

The D.C. Circuit first addressed the attorney-client privilege and provided "[a]ny voluntary disclosure by the holder of such privilege is inconsistent with the confidential relationship and thus waives the privilege." *Id.* at 1369 (quoting *American Telephone & Telegraph*, 642 F.2d at 1299). The court also rejected Tesoro's assertion of a limited waiver of the attorney-client privilege:

> The client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others, or to invoke the privilege as to communications whose confidentiality he has already compromised for his own benefit. . . . The attorney-client privilege is not designed for such tactical employment.

Id. at 1370 (quoting *Permian*, 665 F.2d at 1221). The court held that a limited waiver could not be employed against either a federal agency, as was the case in *Permian*, or a private party litigant, as was the case in *Subpoenas Duces Tecum*. *Id.*

The court next addressed waiver of the work-product rule and recognized generally that:

> [*T*]*he work product privilege* does not exist to protect a confidential relationship [like the attorney-client privilege], but rather *to promote the adversary system by safeguarding the fruits of an attorney's trial preparation from the discovery attempts of an opponent*. . . . A disclosure made in pursuit of such trial preparation, and not inconsistent with maintaining secrecy against opponents, should be allowed without waiver of the privilege."

Id. at 1371 (quoting *American Telephone & Telegraph*, 642 F.2d at 1299) (emphasis in original). However, the court provided: "[t]he doctrine of implied waiver allows courts to retain some discretion to ensure that specific assertions of privilege are reasonably consistent with the purposes for which a privilege was created." *Id.* (quoting *Sealed Case*, 676 F.2d at 817). Employing such discretion and the reasoning of *Sealed Case*, the court held that Tesoro had waived its work product privilege because it sought to employ the privilege in a manner inconsistent with its purpose, had no reasonable basis for believing that the disclosed information would be kept confidential

by the SEC, and such waiver did not impede on the inherent policy elements of the privilege. *Id.* at 1371-72. The court also rejected Tesoro's argument that the SEC had agreed to maintain Tesoro's attorney-client and work product privileges because the record did not provide any correspondence from the SEC to Tesoro to that effect. *Id.* at 1373-74.

Although the positions of the relative parties in *Subpoenas Duces Tecum* and the case *sub judice* are slightly different, the cases are analogous. Like Tesoro, MMC has disclosed its misdeeds to the government in return for leniency. Whereas Tesoro attempted to claim privilege against the shareholders to avoid becoming the defendant in a derivative action, MMC now attempts to claim privilege to escape being implicated by criminal defendant Pollard. Finally, like Tesoro, MMC claims that the government agreed to preserve MMC's attorney-client and work product privileges but does not have a government letter confirming this. Yet, the case *sub judice* differs from *Subpoenas Duces Tecum* in that it is a criminal trial; thus, preservation of the criminal defendant's rights alone may mandate discovery of the disputed material.

MMC argues that its letters to the government and the affidavit of its counsel prove that it took "affirmative action to preserve confidentiality." *See In re Horowitz*, 482 F.2d 72, 82 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). The Company cites *Teachers Insurance and Annuity Ass'n of America v. Shamrock Broadcasting Co.*, 521 F. Supp. 638 (S.D. N.Y. 1981), to support its claim that a party does not waive its attorney-client or work product privileges if it provides a reservation of these privileges with production.

Finally, MMC argues that if its disclosure to the government constitutes a waiver of its attorney-client and work product privileges, such waiver is limited to the documents disclosed. The Company bases this argument

on the Second Circuit's decision in *Von Bulow v. Von Bulow*, 828 F.2d 94 (2d Cir. 1987), holding that publication by Claus Von Bulow's attorney of some of his communications with Von Bulow in his book describing Von Bulow's successful criminal defense did not constitute a complete waiver of all communications between Von Bulow and his counsel concerning the same subject matter. Applying the "fairness doctrine," the court provided: "[W]here, as here, disclosures of privileged information are made extrajudicially and without prejudice to the opposing party, there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed." *Id.* (Westlaw copy at 13). However, in this case, the disclosures were not made extrajudicially, and they may very well prejudice the party opposing the privilege; thus, *Von Bulow* is not on point.

MMC also argues that the waiver of the attorney-client and work product privileges must be limited to the documents disclosed because disclosure was made in the context of settlement. In support of this reasoning, MMC quoted the following language from *Burlington Industries v. Exxon Corp.*, 65 F.R.D. 26, 46 (D. Md. 1974):

> This court is an agreement with the view that confidential information disclosed during settlement negotiations does not constitute a waiver of the entire attorney-client or work product privileges. It is a waiver limited to that information disclosed during the negotiations.

However, the court continued:

> Nevertheless, the court is not unmindful to the fact that privileges cannot be used as both a sword and a shield. A party cannot choose to disclose only so much of allegedly privileged matter as is helpful to his case.

Id. (citing 8 Wigmore, Evidence § 2327 (McNaughton Rev. 1961)). Since MMC is potentially employing its

attorney-client and work product privileges as both a sword and shield, and since the rights of criminal defendant Pollard are of the utmost importance, it seems inappropriate to limit MMC's waiver of its privileges to the information it has disclosed to the government. As the Second Circuit recognized in *Von Bulow*:

> [I]t has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut. *Hunt v. Blackburn*, 128 U.S. 464, 470-71 (1888). From that has grown the rule that testimony as to part of a privileged communication, in fairness, requires production of the remainder. McCormick on Evidence § 93, at 194-95 (2d ed. 1972).

Westlaw copy at 11.

In light of the foregoing discussion, and the overriding importance of the waiver issue, the documents in item 3 will be addressed first.

On September 17, 1986 and November 25, 1986, the Company submitted what it called a "Position Paper" to the government. By its own terms, that paper is "a written presentation discussing the factual and legal issues raised in the Baltimore federal grand jury investigation of the Company and its wholly-owned subsidiary, Maxim Group, Inc." It is obvious that the Position Paper is based not only on contemporaneously made records of events, but also on interviews conducted long after the events. For example, Mr. Westfall is quoted extensively from his January 31 and February 1, 1985 interviews. Moreover, the Paper contains assertions such as: "Of those consulted within the Company, all will testify that any qualms they had about the arrangement had nothing to do with worries about fraud." (September 17, 1986 at 29). In the November supplement, it is stated that

"there is no evidence, testimonial or documentary, that any Company officials in the meeting [of November 17, 1983], except Mr. Pollard and his Maxim employees, understood that Maxim had departed from the strict procedures of its IVI contract." (November 25, 1986 at 9).

A plea agreement was reached early in December, 1986, followed by an Administrative Settlement Agreement at the end of January, 1987. Both of these resulted in some public disclosure of the material involved here.

ITEM 3

There were two separate submissions in this category: a box containing "MMC-DLA communications and a small folder containing drafts of the Administrative Settlement Agreement and material involving Jay Brozost relevant to implementation of the Agreement. None of this material has been shown to be currently protected by either the attorney-client privilege or the work product doctrine, although some may not be relevant to the pending criminal charges.

With regard to published data—such as the Administrative Settlement Agreement—the information revealed to others, as well as details underlying the data, do not enjoy a privilege, *United States v. (Under Seal)*, 748 F.2d 871, 875 (4th Cir. 1984). The "details underlying the published data" include:

> "communications relating the data, the document, if any, to be published containing the data, all preliminary drafts of the document, and any attorney's notes containing material necessary to the preparation of the document."

748 F.2d at 875 n.7.

An *in camera* inspection of the documents in the box reveals the following:

1. All correspondence between MMC and DLA must be disclosed under the principle in *(Under Seal)*

as data meant to be published or underlying detail.

2. Smith's handwritten notes, except those which are indeciferable, also deal with public information. The Company has not attempted to identify any portion of these notes that may *not* relate to the published data as defined above.

3. Notes by Menaker and Johnson similarly appear to be directly related to the published data, containing interview notes and outlines of the Position Paper.

4. The Integrity Program Manual is not explained and does not appear to be protected.

5. The Drafts of the Agreement are not privileged.

6. The Brozost material was generated after the agreement was reached in compliance with its terms. While not privileged, it does not appear relevant, consisting of reports of other wrongdoings.

ITEM 2

Much of the interview material[2] may well have been protected by the attorney-client privilege when initially obtained. Some of it, however, has been disseminated. For example, the Westfall interview of January 31, 1985-February 1, 1985, is explicitly quoted in the Position Paper. The notes indexed here under Stanfield Johnson are copies of the same notes produced for item 3 labelled "Legal pads 6, 7, 8, and 9." Inasmuch as the Position Paper contains blanket references to all available evidence, interviews prior to the second submission on November 25, 1986, have lost their privileged character due

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[2] The tapes submitted along with the transcripts were spot checked for accuracy. No serious errors in substance were found. Pencil notations appear in the transcripts noting inaccuracies.

to voluntary disclosure. The only later materials are the Johnson notes mentioned above that are also in item 3 and some Smith notes in file 6 that are too cryptic to be readily understood.

ITEM 1

The Company asserts that the documents responsive to this request have, in large measure, been made available to defendant, albeit not in their presently organized fashion. Unless the defendant can demonstrate a need to have them produced again, the material will be returned to MMC. As stated above, however, the documents in folder 1 (documents dated after October 6, 1984) have not previously been disclosed and the Company does not assert a privilege as to them on the accompanying inventory. Folder 1, therefore, will be disclosed.

/s/ Joseph H. Young
United States District Judge

EHT:fc(Ind0406)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

UNITED STATES OF AMERICA	*	CRIMINAL NO.
v.	*	(Conspiracy to Defraud the United States, 18 U.S.C.§ 371; Mail Fraud, 18 U.S.C.
WILLIAM C. POLLARD	*	§ 1341)

****

INDICTMENT

The Grand Jury for the District of Maryland charges:

1. At all times pertinent to this Indictment, Martin Marietta Corporation (hereinafter referred to as "MMC") was a publicly-held Maryland corporation with its corporate headquarters located at 6801 Rockledge Drive, Bethesda, Maryland.

2. At all times pertinent to this Indictment, Maxim Group, Inc. (hereinafter referred to as "Maxim") was a Delaware corporation and a wholly-owned subsidiary of MMC with its corporate headquarters in Orlando, Florida.

3. At all times pertinent to this Indictment, IVI Travel, Inc. (hereinafter referred to as "IVI") was a Delaware corporation, with its corporate headquarters in Deerfield, Illinois.

4. At all times pertinent to this Indictment,

Performance Travel, Inc. (hereinafter referred to as "PTI") was a Delaware corporation and a wholly-owned subsidiary of IVI with its corporate headquarters in Deerfield, Illinois.

Martin Marietta Corporation

5. At all times pertinent to this Indictment, MMC was engaged in the business of the development, manufacture and sale of systems and products in the aerospace and defense fields to the Department of Defense as well as to various other branches of the federal government.

6. At times pertinent to this Indictment, WILLIAM C. POLLARD was Director of Corporate Travel Services of MMC.

Maxim Group, Inc.

7. At times pertinent to this Indictment, Maxim was in the business of providing consulting services to IVI Travel, Inc.

8. At all times pertinent to this Indictment, WILLIAM C. POLLARD was President of Maxim.

9. At times pertinent to this Indictment, Richard Westfall, John Rayburn and Gregory Levins were employees of Maxim Group, Inc.

IVI Travel, Inc.

10. At all times pertinent to this Indictment, IVI was engaged in the business of providing travel services to corporate customers.

11. At times pertinent to this Indictment, it was the practice of IVI as well as other travel agencies to rebate to their corporate clients a portion of the commissions attributable to that client's travel which the travel agency received from

airline, rental car and hotel bookings.

Performance Travel, Inc.

12. At all times pertinent to this Indictment, PTI was engaged in he business of providing travel services to MMC.

13. At times pertinent to this Indictment, Beth Truett was General Manager of PTI.

The Martin Marietta Corporation/
Performance Travel, Inc. Relationship

14. In late 1982, MMC agreed with IVI Travel, Inc. that IVI's subsidiary Performance Travel, Inc. would provide travel services to MMC. These services included the booking of airline tickets, hotel reservations and rental cars for MMC travelers.

15. The expenses of the PTI operation were paid out of the commissions which it received from the airlines, hotels and rental car companies. When these expenses had been covered, PTI passed the remainder of the commissions through to its owner IVI.

The Maxim Group, Inc./IVI Travel, Inc. Relationship

16. At the same time that the travel services arrangement between MMC and PTI was set up, MMC created a wholly-owned subsidiary Maxim Group, Inc. whose function was to perform consulting services for IVI. All Payments made to Maxim by IVI were credited to the accounts of MMC.

17. Although it was not set forth in a written form, there was an understanding that IVI would be entitled to keep one percent (1%) of the total travel booked by MMC through PTI, or approximately 10% of the commissions paid to PTI, as a management fee and the remainder of the commis-

sions after PTI's expenses were deducted was to be available to Maxim to be earned through that company's completion of tasks for IVI.

18. Under the applicable Department of Defense regulations MMC was required on certain contracts to account to the government for any sums of money which it received as rebates on expenses incurred pursuant to those contracts.

19. The performance of bona fide tasks for reasonable sums of money was known to MMC officials to be necessary in order for MMC to keep the money paid to Maxim by IVI rather than accounting to the Department of Defense for the money which resulted from travel on government contracts.

20. The Defense Contract Audit Agency (DCAA), an agency of the United States Department of Defense, would and did perform audits of MMC to determine whether all credits or reductions in cost realized by MMC on government contracts had been properly accounted for.

21. At all times pertinent to the Indictment, WILLIAM C. POLLARD was aware of the applicable provisions of the government regulations and knew that, in order for MMC not to have to account to the government for the money attributable to government travel which was paid to Maxim by IVI, the money had to be earned through the completion of bona fide tasks.

22. WILLIAM C. POLLARD and various other MMC and Maxim employees from time to time referred to the money available in IVI to be earned by Maxim as "the bucket."

The Conspiracy to Defraud the Department of Defense

23. From in or about November, 1983 through in or about November, 1984, in the State and District of Maryland and elsewhere,

WILLIAM C. POLLARD

together with others known and unknown to the Grand Jury, did unlawfully, knowingly and willfully, conspire, combine, confederate and agree together, and with each other to defraud the United States by impeding, impairing, obstructing and defeating the lawful governmental functions of the Defense Contract Audit Agency of the United States Department of Defense in the determination of costs associated with contracts awarded to and performed by the Martin Marietta Corporation.

24. It was part of the conspiracy that WILLIAM C. POLLARD, knowing that Maxim had not performed tasks sufficient to earn the money which had built up in "the bucket", demanded and received monies from IVI Travel, Inc. regardless of whether bona fide tasks had been performed.

25. It was a further part of the conspiracy that WILLIAM C. POLLARD, knowing that money received by Maxim which was not in payment for bona fide tasks had to be accounted for to the government, ordered the falsification of books and records of Maxim in order to conceal the nature and source of the funds.

26. It was a further part of the conspiracy that WILLIAM C. POLLARD directed his subordinates at Maxim to create documentation for the Maxim files which would indicate that IVI had requested tasks and those tasks had been performed when, as WILLIAM C. POLLARD then well knew, the information contained in the documents was false.

27. It was a further part of the conspiracy that WILLIAM C. POLLARD requested a representative of IVI to retroactively change the way the books of account of PTI were

kept so there would not be so clear a relationship between the amount of money in "the bucket" and the amount of money paid to Maxim.

28. It was a further part of the conspiracy that WILLIAM C. POLLARD, after he learned of an investigation of Maxim's operations, directed one of his subordinates at Maxim to remove and destroy incriminating materials from the company's files.

Overt Acts

In furtherance of the said conspiracy, there were committed the following overt acts in the State and District of Maryland and elsewhere:

1. On or about April 30, 1984, WILLIAM C. POLLARD, in a letter sent from Bethesda, Maryland, requested IVI to change the reimbursement rate for certain Maxim employees on loan to IVI from three times their salaries to five times their salaries.

2. On or about June 6, 1984, WILLIAM C. POLLARD caused IVI to issue four checks payable to Maxim Group, Inc., in the total amount of $168,728.60.

3. On or about June 22, 1984, WILLIAM C. POLLARD caused IVI to issue six checks payable to Maxim Group, Inc., in the total amount of $175,000.

4. In or about June, 1984, in Bethesda, Maryland, WILLIAM C. POLLARD directed Gregory Levins and Richard Westfall to prepare documentation for the Maxim files to substantiate payments previously received from IVI.

5. In or about July, 1984, WILLIAM C. POLLARD met with Richard Westfall, Gregory Levins and Beth Truett to discuss the status of the documentation underly-

ing the tasks.

6. On or about August 1, 1984, WILLIAM C. POLLARD, from Bethesda, Maryland mailed to the Maxim office in Orlando, Florida, documents he had signed which were intended to be included in the files of Maxim to substantiate payments from IVI.

7. In or about August, 1984, WILLIAM C. POLLARD, in a telephone call from Bethesda, Maryland, requested a representative of IVI to retroactively change a portion of the PTI accounting system.

8. On or about August 21, 1984, WILLIAM C. POLLARD caused IVI to issue a check payable to Maxim Group,Inc., in the amount of $200,000.

9. On or about August 29, 1984, Gregory Levins mailed to WILLIAM C. POLLARD in Bethesda, Maryland, documents for WILLIAM C. POLLARD to sign which documents were intended to be included in the files of Maxim to substantiate payments from IVI.

10. On or about September 3, 1984, WILLIAM C. POLLARD sent to the Maxim office in Orlando, Florida, document she had signed which were intended to be included in the files of Maxim to substantiate payments from IVI.

11. On or about September, 1984, WILLIAM C. POLLARD caused IVI to issue a check payable to Maxim Group, Inc., in the amount of $100,000.

12. In or about September, 1984, WILLIAM C. POLLARD, in a telephone call from Bethesda, Maryland, directed Gregory Levins to destroy any incriminating evidence in the Maxim files.

18 U.S.C. § 371

COUNT TWO

And the Grand Jury for the District of Maryland further charges:

1. Paragraphs 1 through 22 of Count One of this Indictment are realleged and incorporated in this count as if fully set forth herein.

2. From in or about November, 1983 through in or about October, 1984, in the State and District of Maryland and elsewhere,

WILLIAM C. POLLARD

together with others known and unknown to the Grand Jury devised and intended to devise a scheme and artifice to defraud and to obtain money from the United States Department of Defense by means of false and fraudulent pretenses and representations well knowing that such pretenses and representations were false and fraudulent when made.

3. It was a part of the scheme and artifice to defraud that WILLIAM C. POLLARD on behalf of Maxim demanded and received from IVI monies in spite of the fact that Maxim had not performed bona fide tasks to earn the money.

4. It was a further part of the scheme and artifice to defraud that WILLIAM C. POLLARD knew that if money received by Maxim from IVI was not payment for bona fide tasks performed, the money received would have to be accounted for to the government.

5. It was a further part of the scheme and artifice to defraud that WILLIAM C. POLLARD directed his subordinates at Maxim to prepare documentation which indicated that IVI had requested and Maxim had performed certain tasks whereas, as WILLIAM C. POLLARD then well

knew, in many cases IVI had not sought the services from Maxim and Maxim had not performed all or a substantial part of them.

6. It was a further part of the scheme and artifice to defraud that WILLIAM C. POLLARD directed a representative of IVI to retroactively change the way the books of account of PTI were kept so that there would not be so clear a relationship between the amount of money in "the bucket" and the amount of money paid to Maxim.

7. It was a further part of the scheme and artifice to defraud that, after he learned of an investigation of Maxim's operations, WILLIAM C. POLLARD directed Gregory Levins to destroy records.

8. On or about the 1st day of August, 1984, in the State and District of Maryland,for the purpose of executing the above-described scheme and attempting to do so,

WILLIAM C. POLLARD

did knowingly cause to be delivered by the United States Postal Service, according to the directions thereon, an envelope addressed to Maxim Group, In., 6990 Ellenor Drive, Suite 133, Orlando, Florida, containing documents which had been prepared to falsely substantiate payments made by IVI to Maxim.

COUNT THREE

And the Grand Jury for the District of Maryland further charges:

1. Paragraphs 1 through 22 of Count One of this Indictment are realleged and incorporated in this count as if fully set forth herein.

2. Paragraphs 1 through 7 of Count Two of this Indictment are realleged and incorporated in this count as if fully set forth herein.

3. On or about the 29th day of August, 1984, in the State and District of Maryland, for the purpose of executing the above-described scheme and attempting to do so,

WILLIAM C. POLLARD

did knowingly cause to be delivered by the United States Postal Service, according to the directions thereon, an envelope addressed to WILLIAM C. POLLARD, Martin Marietta Corporation, 6801 Rockledge Drive, Bethesda, Maryland containing documents which had been prepared to falsely substantiate payments made by IVI to Maxim.

18 U.S.C. § 1341

BRECKINRIDGE L. WILLCOX
United States Attorney

A TRUE BILL:

FOREPERSON

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

DEFENDANT'S MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO THE "GOVERNMENT'S CONSOLIDATED ANSWERS TO DEFENDANT'S PRE-TRIAL MOTIONS" AND IN RESPONSE TO THE "MOTION OF MARTIN MARIETTA CORPORATION TO QUASH OR MODIFY DEFENDANT POLLARD'S SUB-POENA DUCES TECUM"

* * *

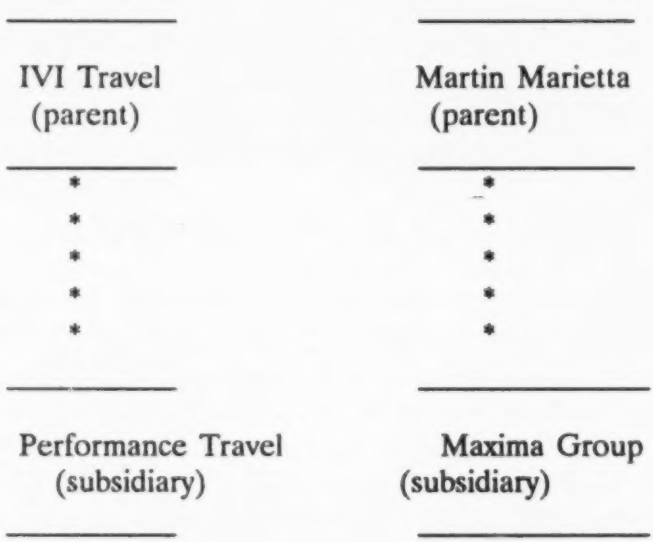
William Pollard, Maxim and the Four Box Model

The defendant Pollard has no background or experience in government contracting and reporting. While he worked at Martin Marietta, the defendant was given the responsibility for a new travel management project utilizing a concept, born in the company's legal department known as the "Four-Box Model".

The Four-Box Model travel management project has at least two objectives which are relevant here: first, to make Martin Marietta more competitive by centralizing management

control over travel practices; and second, to establish a profit center whereby the company could obtain additional revenue through a subsidiary which was not part of its contracting activities.

The four boxes may be pictorially represented as follows:



The bulk of Martin Marietta travel was to be precessed through Performance Travel, with help from IVI. Both Performance Travel and IVI were to receive vital assistance from Maxim, for which Maxim was to be compensated.

Although the defendant was nominally the president of Maxim, he faced enormous internal problems in attempting to manage the new travel management travel project in accordance with the objectives given to him by his supervisors. Martin Marietta operated under a "matrix management" concept, which meant that the defendant was given responsibility without the necessary authority to discharge it.

For example, at the start of the project a committee of

Martin Marietta executives reviewed proposals submitted by various travel agencies. Company lawyers, who reported to senior management, negotiated the terms with the selected travel agency, IVI Travel, thus implementing the Four-Box Model. Martin Marietta corporate personnel were nominally assigned to Maxim, but some so assigned were apparently directed to report leap-frog fashion to senior management.

Notwithstanding these problems, and the fact that the project has to start from a stand-still and rapidly build to serve the travel needs of tens of thousands of traveling employees, the Maxim-Performance Travel-IVI team was soon providing the essential services to Martin Marietta travelers.[1]/

Crisis: The Four-Box Model questioned

During the Spring and Summer of 1984, an internal company audit reported what was perceived as a lack of documentation to support the "reasonableness" of charges from Maxim to IVI. The concern raised by the audit soon reach the level of panic within Martin Marietta's senior management, when agents of the United States Department of Defense questioned the proprietary of Four-Box Model arrangement, and when a critical column appeared in Jack Anderson's syndicated column.

Apparently, Martin Marietta senior management concluded that, because of his position, William Pollard was the ideal "point man" around whom the company could define a damage control area. The word was quickly spread throughout the company that "blame Pollard" would be the line aroundd which

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[1]/ In fact if another travel agency was able to offer superior service or better pricing than the Maxim - Performance Travel - IVI team, nothing prevented Martin Marietta personnel from using a competitive travel agency. Hence, a great deal of time and effort was successfully spent attracting and maintaining travel business from company personnel.

Martin Marietta would base its defense if one were necessary.

The reason for the panic was not that any actual crime had been committed relating to the Four-Box Model.[2] Rather, the company was concerned because condemnation of the arrangement by the Defense Department could subject the company to debarment from federal contracting.

From the Government's viewpoint, particularly contracting instrumentalities of the Defense Department, damage containment was also vital. Having awarded Martin and Marietta a significant slice of the defense budget, the Defense Department had naturally become dependant upon the company's products and services.

On the other hand, the federal procurement system had become a major embarrassment to the defense establishment. When hammers, coffee pots, and toilet seats cost the taxpayers thousands of dollars a piece, the Defense Department obviously was reluctant to allow further erosion of public confidence in a case where wrongdoing on the part of a prominent contractor was publicly suggested by a syndicated columnist.

Even though the Government was the primary beneficiary of the defendant's efforts, through cost reduction achieved by Martin Marietta under an effective travel program, Defense Department auditors took the position that the company should not have any share in the benefits accruing as a result of the new program. Although a criminal investigation of the matter was concluded shortly after the Four-Box Model was questioned

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[2] This must be distinguished from the efforts of Martin Mariettas senior management, which arose from the management which arose from panic, to make Mr. Pollard the "fall guy" which could constitute criminal conduct and which should be uncovered. The cooperation of Government officials in these efforts should also be explored at an evidentiary hearing if the Court does not dismiss the indictment on the basis of the parties' motion papers.

in 1984, the Government deliberately held off the indictment of the defendant in order to pressure him into pleading guilty.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MARTIN MARIETTA'S REPLY TO DEFENDANT'S RESPONSE TO THE MOTION TO QUASH DEFENDANT'S SUBPOENA DUCES TECUM

On June 22, 1987, Defendant filed a twenty-seven page memorandum ("Defendant's Memorandum"), a portion of which responds to Martin Marietta Corporation's ("Martin Marietta" or "Company") Motion to quash filed June 12, 1987. The brief reply seeks only to emphasize two points. First, Defendant impermissibly seeks to use Fed. R. Crim. P. Rule 17 (c) subpoena to engage in a fishing expedition for Martin Marietta documents of doubtful relevance. Second, Defendant's claims of a wholesale waiver of the attorney client privilege and protection of the work product doctrine is unsupported and grossly exaggerated.

* * *

Even if a Rule 17 (c) subpoena could reach these non-evidentiary materials, Defendant must still overcome both the attorney-client privilege and the work product doctrine. Defendant attempts to do so with general assertions of waiver.

Specifically, he claims disclosures to the government as well as to counsel for other individuals as the basis for waiver. See Defendant's Memorandum at 21.

Again, Defendant cites no legal authority to support his assertions. They are factually inaccurate in any event. Neither Martin Marietta nor its counsel has ever permitted or agreed to permit the government to review the material that is protected by the attorney-client privileges and work product doctrine. On the contrary, Martin Marietta repeatedly refused to share those files. Counsel for Martin Marietta did submit a paper to the government. With the exception of a few statements of one individual, that paper did not reveal any client communications or work product. There is simply no work authority, and defendant has cited none, that would suggest that the limited proffer, which the government agreed to maintain confidentially, acted as a waiver for all privileged materials.

Moreover, the few items shared with counsel for other individuals who were then being investigated, was done pursuant to a joint defense agreement. Numerous courts have held that under those circumstances the material remains privileged. See, e.g., Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); United States v. McPartlin, 595 F.2d 1321 (7th Cir.) cert. denied, 444 U.S. 833 (1979); In Re Grand Jury Subpoena, 406 F. Supp. 381 (S.D.N.Y. 1975). Accordingly, there is no bases for holding that there was a waiver of either attorney-client privilege of the work product doctrine.

CONCLUSION

For the reasons stated above (and further discussed in Martin Marietta's Brief of Support of its Motion to Quash filed on June 12, 1987), the subpoena duces tecum should be quashed in its entirety.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

MARTIN MARIETTA CORPORATION'S OPPOSITION TO DEFENDANT'S MOTION TO COMPEL PRODUCTION OF CERTAIN DOCUMENTS

Martin Marietta Corporation ("Martin Marietta" or "Company") files this brief in opposition to defendant Pollard's Motion to Compel production of certain documents. . . .

* * *

C. The Company Has Not Waived of Either the Attorney-Client Privilege or the Work Product Doctrine

As indicated above, the Company has consistently refused to disclose any of its witness interviews, transcripts or recordings or statements which Defendant now seeks. Beizer Affidavit at ¶ 5. The only disclosures that could arguably even come close to a waiver are certain statements made by counsel for the Company to the United States Attorney's Office and to

the Department of Defense. [3] These statements essentially provided counsel's version of the conduct in question and its argument of why that conduct should not result in criminal prosecution (or debarment) of the company. In that sense, they are no different from an opening argument made by counsel at a trial concerning what he intended to prove.

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[3] [footnote omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

AFFIDAVIT OF RICHARD LAWRENCE BEIZER, ESQUIRE

I, Richard Lawrence Beizer, an attorney with the law firm of Crowell & Moring, with offices at 1001 Pennsylvania Avenue, Northwest, Washington, D.C. 20004-2505, make oath and say as follows:

1. I am currently a partner in the law firm of Crowell & Morning and have been so since December 1, 1985. Before then, from August 1, 1983, I was Of Counsel to the Firm.

2. In November 1984, Martin Marietta Corporation ("Company") retained Crowell & Moring to represent the Company in connection with the government's audit and investigation of its subsidiary, Maxim Group, Inc. ("Maxim"). Although, beginning in January, 1985, I became more and more heavily involved in the representation of the Company.

3. As part of Crowell & Morning's representation, attorneys from this firm -- including principally myself -- conducted interviews of a number of past and present Company employees some of which are at issue here. These interviews

were conducted pursuant to a letter from the Company's President, Laurence J. Adams, dated January 8, 1985 (Attachment 3). All interviews conducted by Crowell & Moring attorneys were arranged by the Company at our request in order that we could obtain information necessary to provide the Company with legal advice.

4. To the best of my knowledge, in all of the interviews conducted by this firm, we identified ourselves as counsel to the Company and said that Crowell & Moring had been asked to provide legal advice to the Company and to represent it in connection with the Maxim investigation. We then stated that the interview was covered by the attorney-client privilege and, further, that the privilege belonged to our client, the Company.

5. Except pursuant to a joint defense agreement, Crowell & Moring has never released interview memoranda, interview transcripts, or any electronic recordings of the interviews in which Crowell & Moring or in-house counsel participated. To the best of my knowledge, other than pursuant to a joint defense agreement, these memoranda, transcripts and recordings have not been released by anyone.

6. From the time Crowell & Moring became involved in this matter, this firm conducted its efforts in anticipation of litigating the Maxim matter.

7. Finally, regarding the Position Paper which we gave to the United States Attorney's Office in an attempt to persuade it not to prosecute, the delivery was made on the express understanding of the Company and the government that neither the fact of delivery nor the contents of the Paper would work a waiver of any applicable privilege and that such privileges would remain as if the Paper had not been given to the government. On information and belief, as reflected in the letter from Mr. Johnson dated December 16, 1986, Attachment 6, the Position Paper delivered to the Department of Defense

was likewise to work no waiver of any applicable privilege.

_____

Richard L. Beizer

Sworn and subscribed before me this
Sixteenth day of October, 1987.

_____

Notary Public

My Commission Expires _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

AFFIDAVIT OF DAVID T. CLOUS

I, David T. Clous, make oath and say as follows:

1. Since January 8, 1968, I have been employed by Martin Marietta Corporation. Presently, I am Vice President, Corporate Audit. Previously, I was Director of Corporate Audit.

2. As Vice President now and as Director before, it is and was my responsibility to carry out internal company audit activities on behalf of management. In that capacity, I became familiar with an internal audit of the Martin Marietta subsidiary, Maxim Group, Inc. ("Maxim").

3. Following the October 6, 1984 publication of an article by columnist Jack Anderson, I met on October 8, 1984 with Frank H. Menaker, Jr., Martin Marietta's Vice President and General Counsel. At that time, Mr. Menaker directed me to provide him with assistance on an internal investigation of Maxim's activities.

4. Following that direction, members of the staff and I provided that assistance. Accordingly, from October 8, 1984, the efforts of me and my staff were made in anticipation of litigation with the government about the activities of Maxim.

_____
David T. Clous

Sworn and subscribed before me this
_____ day of November, 1987.

_____
Notary Public

My Commission Expires _____

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

I, GERALD H. WERFEL, under penalty of perjury, do hereby state and declare:

1. I am a Special Assistant to the Director of the Defense Logistics Agency (DLA) and am authorized by the Department of Defense Federal Acquisition Regulation Supplement (DFARS) to act on his behalf in suspension and debarment matters. I am authorized to suspend, propose for debarment, debar, and settle suspension and debarment matters in accordance with the DFARS.

2. The DLA, an agency of the Department of Defense reporting to the Secretary of Defense, is responsible for providing logistics support services to the components of the Department of Defense, including contract administration services. DLA provides contract administration services with respect to Department of Defense contracts awarded to the Martin Marietta Corporation.

3. Inasmuch as DLA provides the Corporate Administrative Contracting Officer for the Martin Marietta Corporation, DLA was tasked on 1 December 1986 by the general Counsel of the Department of Defense, with respon-

sibility to determine whether administrative action, e.e., suspension or debarment, was appropriate with regard to matters arising out of the Martin Marietta travel service investigation.

4. This tasking by the General Counsel of the Department of Defense was a result of a meeting between the General Counsel and representatives of Martin Marietta Corporation. I understand that during that meeting, the representatives for the company asked whether they could have an opportunity to demonstrate that if as a result of the investigation the company was indicted or decided to enter a plea of guilty, the corporation should not be suspended or debarred.

5. I first met with representatives of Martin Marietta Corporation to discuss this matter on 9 December 1986. Numerous meetings and phone conversations occurred between the parties from that date through 9 March 1987, the date on which an Administrative Settlement Agreement between the parties was executed.

6. During our discussions, representatives of Martin Marietta Corporation described the matters disclosed by the travel service investigation as being the fault of William Pollard.

7. During our discussions, in-house counsel for Martin Marietta informed me that the company was paying Mr. Pollard's legal fees with regard to the travel service investigation. This information was unsolicited on my part.

8. My reaction to this information was that of concern that a company which placed blame for the travel service irregularities solely on one identified individual would then pay legal fees for that individual. My concern was significant enough that, after some thought, I requested that the company discontinue paying the legal fees. This was based upon the concept that I was making a business judgment and

present responsibility determination with regard to the corporation. One aspect that I review carefully in making this determination is whether the company took necessary actions with regard to culpable individuals. Here, the company had terminated the individual's employment as a result of his conduct relating to the travel service matters, yet continued to pay his legal fees for representation in this matter. I did not believe that payment of legal fees on behalf of the identified culpable individual reflected affirmatively on the company and therefore asked the company to terminate the payment of such fees.

9. When I raised the issue of termination of payment of legal fees with representatives of the company, they stated that they would look into the possibility and get back with me. Ultimately, they agreed to terminate the payment of legal fees to Mr. Pollard.

* * *

/s
Gerald H. Werfel

Subscribed and sworn to before me at Alexandria, Virginia on this 30th day of June, 1987.

/s
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. Y-87-0142

UNITED STATES OF AMERICA

v.

WILLIAM C. POLLARD

TRANSCRIPT OF MOTION HEARING
BEFORE HONORABLE JOSEPH H. YOUNG
UNITED STATES DISTRICT COURT JUDGE
NOVEMBER 13, 1987

* * *

Mr. Beizer: The issue is whether or not there was, indeed, a waiver in this case and, secondly, what the scope of that waiver was.

* * *

Mr. Beizer: Let me emphasize the point that we were not a party and we are not a party to this proceeding, that is, United States versus William Pollard. Likewise, your Honor, it's our contention that we did not use those documents in any litigation at the Department of Defense, certainly did not use them against a party thereby commanding that the operation of the rule of fairness be put into operation.

The Court: But they were quoted in the position paper,

were they not?

Mr. Beizer: Yes, your Honor, the same.

Supreme Court, U.S.
FILED
MAR 13 1989
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1338

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

WILLIAM C. POLLARD,
Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Cross-Respondent.

On Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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MARTIN MARIETTA'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

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IN THE

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---

MARTIN MARIETTA'S BRIEF IN OPPOSITION TO THE CROSS-PETITION

COUNTERSTATEMENT OF THE CASE

None of the questions presented by the Cross-Petition were raised below or decided by the Court of Appeals. If those questions ever need be decided at all, they are better addressed on a complete record in the lower courts before being pursued in this Court. In short, while the important questions presented in the main petition (No. 88-1157), whether (as the courts below determined) any privileges protecting Martin Marietta's documents were waived by a submission to the prosecutor, should be decided now, there will be time enough to consider the questions raised by the Cross-Petition on remand.

The district court's decision enforcing the subpoena rested solely on the court's conclusion that Martin

Marietta[1] had broadly waived its attorney-client and work product privileges by submitting a position paper to the United States Attorney. Cross-Petition App. 30a-33a. The Court of Appeals substantially sustained that position. The Court of Appeals did not question the general applicability of the privileges to the documents in question (for Pollard did not challenge it on appeal), but held that there had been a waiver on the basis of one event, and one event only: the submission of a position paper and its supplement to the federal government. It was on this basis alone that the Court of Appeals ordered the documents in question to be provided to Pollard. Cross-Petition App. 12a.

In the Court of Appeals, Pollard argued only waiver.[2] The only waiver that was argued was the waiver said to arise from the submission of the position paper to the federal government. *See* Cross-Petition App. 6a. Stated conversely, Pollard raised none of the questions that he now seeks to present by this Cross-Petition. The Court of Appeals never, impliedly or otherwise, passed on those questions.[3]

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[1] Martin Marietta's Rule 28.1 statement was filed with this Court with its request to enlarge the time to petition in No. 88-1157.

[2] The only other issues briefed by the parties and addressed by the Court of Appeals involved the question whether the subpoenaed documents met the general standards of Fed. R. Crim. P. 17(c). It was in this context that Pollard spun a series of factual theories that he now recites as fact and invoked his Sixth Amendment rights. The Court of Appeals held that these materials were subject to a Rule 17(c) subpoena. Although Martin Marietta respectfully maintains its disagreement with the panel's opinion on the Rule 17(c) issue, it recognizes that the Court of Appeals' error might not independently warrant a grant of certiorari. The issue of implied waiver of the attorney-client and work product privileges is, however, an issue of substantial and widespread concern.

[3] For the convenience of the Court and to avoid any improvident grant of the Cross-Petition, Martin Marietta has requested a copy of Pollard's brief in the Court of Appeals be transmitted to this Court pursuant to this Court's Rule 19.

In support of the Cross-Petition, Pollard has set forth an extended statement of the case, relying almost entirely on extra-record materials. There is no need to catalogue all of the assertions of purported fact for which no record support is or could be cited, the quotations from items of evidence not part of the record on appeal [4], the instances in which cross-petitioner has cited to his own brief in the court below as the sole support for some alleged fact [5], the fictive citations to cross-petitioner's own Appendix [6], or arguments for which a conclusion of fact is stated, but no such conclusion is found in the decision of the Court of Appeals.[7]

One factual ambiguity created by the Cross-Petition may warrant clarification. While Pollard refers repeatedly to "lawyers" and "lawyers panicking," and lawyers

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[4] *E.g.*, Cross-Petition at 8-12 nn.4 and 5. Those transcripts were never provided to Martin Marietta and were never part of the record on appeal. To be sure, Pollard employed the same technique of quoting documents not of record in his brief to the Court of Appeals. The Court of Appeals relied upon *none* of those extra-record assertions in rendering its decision.

[5] *E.g.*, Cross-Petition at 4.

[6] For example, Pollard asserts that "attorneys, principally Elliot [sic] Light, who reported directly to senior Martin Marietta management," created the fraudulent scheme, a proposition for which the Cross-Petition appears to cite "App [sic] 37a, 46a)." *See* Cross-Petition at 6. The first citation is to the indictment, which nowhere mentions Mr. Light; the second citation is to a portion of Pollard's own brief in the district court, which also fails to mention Mr. Light.

[7] Pollard states in a footnote that "a broad subject matter of attorney client communication and work product was made available to the Government and the Grand Jury," Cross-Petition at 9 n.4, quoting an excerpt from a grand jury transcript. The Court of Appeals found no such broad disclosure and rested exclusively on the alleged waiver of both privileges said to arise from the submission of the position paper. The district court found waiver on the same theory.

being part of a conspiracy, the plain facts are that the investigation began, and all the documents at issue were generated, *after* the criminal activity alleged in the indictment ended. The internal "audit" documents at issue, as well as attorney notes, memoranda and transcripts, were prepared following the publication of an October 1984 article in the newspapers exposing Pollard's activities—what the Cross-Petition refers to as the "Anderson Article." Cross-Petition at 6. Outside counsel was retained in November of 1984.[8] Cross-Petition App. 53a. Although the indictment references a scheme to defraud extending from about November 1983 to "about" November 1984, the *last* overt act charged is Pollard's alleged order to "destroy any incriminating evidence in the Maxim files" in "September 1984." Cross-Petition App. 40a.

Thus, despite the possible jury appeal of alluding ambiguously to conspiracies by lawyers, the internal investigation (and the privileged documents which it generated) began at the time of the publication of an article in the newspapers; that same article necessarily marked the end of the alleged covert scheme. There is nothing in the indictment that suggests or intimates in any way that the investigatory efforts of the attorneys following disclosure of the scheme was in any way related to the crimes charged.[9]

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[8] Martin Marietta claimed privilege with respect to only a few attorney and other notes generated in October 1984, prior to retention of outside counsel. The notes of outside counsel and transcripts of interviews conducted by outside counsel after November 1984 primarily compose the documents at issue here.

[9] Pollard refers to the Court of Appeals' ambiguous statement in connection with the Rule 17(c) issue that "[s]ince Pollard did not have direct contact with the DOD, the charge against him for defrauding the DOD is essentially a charge that he obstructed Martin Marietta's corporate internal audit of its subsidiary Maxim." Cross-Petition at 14. This statement was not relied upon by the Court of Appeals in finding waiver. The Court of Appeals was

REASONS FOR DENYING THE CROSS-PETITION

The main petition, No. 88-1157, presents questions arising from the issues briefed, argued and actually decided by the courts below: Whether or to what extent Martin Marietta's attorney-client and work product privileges were waived by Martin Marietta's submission of a position paper to the United States Attorney. The Court of Appeals held that whatever privileges attached to the documents in question, those privileges were waived. On that basis alone, the Court of Appeals sustained the district court's order that sundry privileged documents be produced to Pollard in response to his Rule 17(c) subpoena. In contrast, relying on extra-record assertions of fact, the Cross-Petition presents a series of arguments never presented to the courts below—and certainly not addressed by either court.

That the theories raised by the Cross-Petition were not addressed by the courts below is sufficient reason to deny the Cross-Petition. Moreover, those theories do not bear upon the issue of waiver. In fact, while the questions presented by the main petition were actually decided below, and the general issues raised by the main petition have previously been addressed (albeit inconsistently) by several lower courts, the issues raised by the Cross-Petition have, to all appearances, never before been addressed by any court in this case—or in any other.

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paraphrasing the district court, which had noted Pollard's *argument* that "Since defendant did not have any direct contact with DCAA auditors, he is essentially charged with obstructing MMC's corporate internal audit . . . ." Cross-Petition App. 22a.

A review of the indictment shows that Pollard's characterization of the case was neither correct nor relevant. Pollard is plainly not charged with obstructing Martin Marietta's internal audit to the extent that audit postdated the Anderson article; nor is he charged with obstruction of any of the other investigative efforts of Martin Marietta in preparation for litigation. That is simply not part of any fraud charged in the indictment. In any event, the issue was not raised or discussed by the Court of Appeals in connection with its finding of waiver.

If, by failing to raise these issues at the outset, Pollard has not already waived his right to pursue them (an issue for the courts below to determine), they should first be addressed on remand from No. 88-1157.

THERE IS NO REASON WHY THIS COURT SHOULD ADDRESS ISSUES NOT CONSIDERED BY THE COURTS BELOW

Only in the most exceptional cases will this Court address issues that have been neither raised nor decided by the lower courts. *Youakim v. Miller*, 425 U.S. 231, 234 (1976); *Delta Air Lines, Inc. v. August*, 450 346, 362 (1981). The Court particularly disfavors addressing issues that may rest on factual issues that have not as yet been resolved by the district court. *See Jenkins v. Anderson*, 447 U.S. 231, 234 n.1 (1980). Indeed, in a case similar to the present one, the Court declined to address respondent's argument that the work product privilege should not apply on a ground that had not been raised below. *Federal Trade Commission v. Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983). No exceptional circumstances are present in this case to warrant a departure from this general rule, particularly because the questions are novel and depend in part on facts not presented to the district court or part of the record in this Court.

Pollard's Cross-Petition does not offer legal theories to support the finding of waiver by the courts below.[10] Instead, he argues generally that the work product privilege cannot bar the production of material that is otherwise properly subject to a defense subpoena issued under Fed. R. Crim. P. 17(c) because (1) such a rule would impinge upon a defendant's Sixth Amendment right to

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[10] A finding of waiver has very different implications than a finding for example, that work product does not apply in the context of a Rule 17(c) subpoena or that, in light of some compelling need, the claim of work product should be overridden with respect to some document.

compulsory process, Cross-Petition at 16-20; (2) the Federal Rules of Evidence deprive the federal courts of authority to "create" a work product rule that would apply to limit the introduction of evidence in the courtroom, Cross-Petition at 21-23; and (3) the work product rule was "never intended" to apply to admissible evidence.[11] Cross-Petition at 23-25.

With respect to the first argument, Pollard recognizes that a defendant's Sixth Amendment right to compulsory process has ordinarily been regarded as subject to ordinary rules of evidence and procedure. Cross-Petition at 17.

With respect to the second argument—that the Federal Rules of Evidence limit the authority of the federal courts to create and apply work product restrictions in an evidentiary setting, Cross-Petition at 21-23—this Court has already concluded that work product protection extends beyond "discovery," and rises to the level of a "qualified privilege," *United States v. Nobles*, 422 U.S. 225, 237 (1975), to restrain the evidentiary use of work product at trial. *Id.* at 239 ("Disclosure of an attorney's efforts at trial, as surely as disclosure during pretrial discovery, could disrupt the orderly development and presentation of the case"). The Federal Rules of Evidence expressly authorizes the federal courts to determine privilege questions by resort to "principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." Fed. R. Evid. 501. Pollard cites no case of this Court or any other suggesting that this grant of authority was really a limitation on this Court in interpreting and applying the work product privilege recognized in *Hickman v. Taylor*, 329 U.S. 495 (1947), 25 years before the Federal Rules of Evidence were adopted.

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[11] As pointed out above, Pollard also intimates that there were other waivers of the work product privilege not found or considered by the courts below. *See, e.g.*, Cross-Petition at 9 n.4.

In support of the third argument, that the work product rule should not be an evidentiary privilege applicable to the introduction of relevant and admissible testimony at trial, Pollard relies upon the concurring opinion in *United States v. Nobles*, 422 U.S. 225, 242 (1975) (White, J., concurring). But it is unlikely that the theory set forth in the concurring opinion would extend to these facts:

(a) This petition does not involve an attempt to introduce evidence at trial. Instead, we have a Rule 17(c) subpoena issued long before trial in an attempt to gather *potentially* relevant and *potentially* admissible material. Even the concurring opinion in *Nobles* stated that material sought for preparation purposes is not sufficient to overcome work product protection. 422 U.S. at 252 n.12. The court below assuredly has not determined whether any of the material would actually be admissible at trial, sufficient to overcome hearsay and materiality objections, or that any given document is relevant for impeachment of some witness' testimony.[12] In fact, even the concurring opinion in *Nobles* recognized that there is grave potential danger in allowing *attorney* generated documents to be used as courtroom evidence. 422 U.S. at 252-53 (White, J., concurring). Most of the documents at issue here fall squarely in that category.

(b) The concurring opinion in *Nobles* found few cases in which the issue of the evidentiary use of attorney work product in the courtroom had arisen. 422 U.S. at 246-47. It is fair to say that the reason that the issue rarely arises is because (1) work product is not ordinarily available through discovery and, therefore, it does not often find its way into the courtroom, and (2) it has

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[12] The Court of Appeals held only that the trial court did not abuse its discretion in determining that Pollard's Rule 17(c) subpoena was a "good faith" effort to obtain evidentiary material—not that any specific item covered was admissible as evidence in Mr. Pollard's trial. Cross-Petition App. 5a.

been assumed to be inadmissible. As the tone of the Cross-Petition in this case makes clear, however, if attorney work product were even arguably subject to evidentiary use, these issues would arise with frequency, for the temptation to inject the lawyers into the courtroom is great. Statements made by attorneys and witnesses in the course of trial preparation would inevitably be grist for colorful cross-examination.

Thus, the issues raised by this Cross-Petition assuredly have broad implications, but scant support. Their breadth only emphasizes why this Court should not address them now without allowing the lower courts to address them first. By their terms, they do not go to the question of waiver as found by the courts below. Whether there were any other waivers of the work product privilege, or whether the privilege does not apply to some or all of the documents, should be determined on an evidentiary record by the district court. And the issues raised about Pollard's Sixth Amendment rights and the need for particular materials as those needs emerge at trial, are arguably subsumed by the existing "substantial need" test for obtaining work product (*see* Fed. R. Civ. P. 26(b)(3))—a test that neither the district court nor the Court of Appeals had occasion to reach in this case, having found waiver instead.

In this Court, the question actually decided below—whether a submission to the United States Attorney of the kind made here waives the attorney-client and work product privileges for the attorneys' underlying investigative materials—is squarely presented by the petition in No. 88-1157. That question can and should be decided without reaching the issues raised by the Cross-Petition.

CONCLUSION

The Cross-Petition should be denied.

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No. 88-1338

IN THE
Supreme Court of the United States
October Term, 1988

WILLIAM C. POLLARD,
Cross-Petitioner,

v.

MARTIN MARIETTA CORPORATION,
Cross-Respondent.

REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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REPLY BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Pollard's Cross-Petition in the instant case seeks relief from the judgment below on the grounds that the Court of Appeals erroneously applied the work product doctrine to deny a defendant in a criminal trial access to evidence that court had determined to be relevant, admissible and specifically designated, as defined by Fed. R. Crim. P. 17(c) and controlling precedents thereunder. The Cross Petition rests upon questions of law as to whether the work product doctrine should be applied in this manner in light of: (1) the Sixth Amendment compulsory process clause; (2) Fed. R. Evid. 501; (3) the doctrinal basis of the work product doctrine itself; and (4) the "good cause" exception to the work product doctrine.

In Case No. 88-1157, Martin Marietta Corporation urges this Court to grant Certiorari to consider its arguments that the District Court and the Court of Appeals went too far in

applying the waiver doctrine applicable to Attorney Client privilege and limited work product protection. Although Martin Marietta opposes the grant of the Cross-Petition, it offers little argument on the merits to show that the questions raised in the Cross-Petition are unimportant or insubstantial. Instead, it claims that the arguments raised in the Cross-Petition should not be considered by this Court because they were not presented in the brief to the Court of Appeals and that the issue of waiver should be determined in the absence of any consideration of whether the documents in question are privileged or protected from disclosure in the first instance.

Although the Court of Appeals reversed Martin Marietta's contempt citation on the basis of a distinction between "pure opinion" work product and work product involving matters of fact, the Company's opening brief to the Court of Appeals did not raise any such distinction. [1] The Court of Appeals decision shows that the portion of the judgment below from which Pollard seeks relief is based upon matters *which Martin Marietta first raised in oral argument and not in its briefs below.* (Pet. App. 12a-13a).

The District Court's order required all of the documents at issue to be made available to Pollard for use in his defense at his trial on the grounds of waiver, and Pollard had no reason at the time of his initial brief to make any issue of what then appeared to be an academic point: whether the District Court erroneously classified as privileged or protected some of the documents which it held to be subject to disclosure in either event. [2]

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[1] Pollard has requested that a copy of Martin Marietta's brief in the Court of Appeals be transmitted to this Court pursuant to this Court's Rule 19.

[2] The ultimate issue before the Court of Appeals was the reversal or affirmance of Martin Marietta's contempt citation. The Court of Appeals could not have affirmed the contempt citation on the theory

Because Martin Marietta has failed to comply with the District Court order below, Pollard has not seen *any* of these documents, and he could hardly be expected to anticipate when he filed the Court of Appeals brief referred to by Martin Marietta that the Company would later contend in oral argument that some of the documents at issue involved matters of pure opinion only and that the Court of Appeals would hold that the work product doctrine applied to these documents but that any attorney client privilege had been waived. Without access to the materials at issue, Pollard argued for affirmance of the District Court on the basis of waiver principles applicable to both the attorney client privilege and the limited protection afforded work product materials.

For this Court to avoid the issues raised in the Cross-Petition would only cause the Court's opinion to become confusing and misleading. Martin Marietta has no basis to argue that the waiver issue can be decided independently of the question of whether the materials at issue were privileged or protected from disclosure in the first instance. If Martin Marietta prevails on the merits of its Petition and this Court holds that the Court of Appeals went too far in applying the waiver doctrine to work product materials, lower courts and litigants in other cases will assume that in circumstances similar to the case at bar a work product privilege is available, even to the extent that it cuts off a defendant's access in a criminal trial to materials that are otherwise available under Fed. R. Crim. P. 17(c). As Martin Marietta's arguments make clear, litigants are prone to read into the Court's decisions matters

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that Martin Marietta should have produced part of the materials required to be disclosed by the District Court. *Bowman Dairy Co. v. United States*, 341 U.S. 214, 221 (1951). Until Martin Marietta made its representations to the Court of Appeals later on that some of the materials involved "pure opinion" work product, any argument by Pollard addressed to the work product protection which did not also dispose of attorney client privilege would have been ineffective for the purpose of affirming the District Court judgment.

which they contend *should* have been decided, even if they were not. Thus, Martin Marietta cites: *Hickman v. Taylor,* 329 U.S. 495 (1947), for the proposition that work product protection was recognized as an evidentiary privilege within the meaning of Fed. R. Evid. 501 (Opposing Brief at 7) even though the Court stated that such materials were *not* privileged (329 U.S. at 509-510 & n. 9); and *United States v. Nobles,* 422 U.S. 225 (1975), for the proposition that a work product privilege applies at trial, even though the opinion of the Court expressly left the application of the work product doctrine at trial to another day and held simply that any privilege "as may have existed" had been waived (422 U.S. at 239). [3]/

To the extent that Martin Marietta urges reversal on the basis of the limited work product protection, Pollard has every right to urge any matter to support the judgment below, including the absence of any lawful privilege in the first instance, even without any Cross-Petition. *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419 (1974). [4]/ To the

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[3]/ Pollard does not contend that the work product doctrine lacks any application at trial. He has never claimed the right even as a defendant in a criminal case to litigate on wits borrowed from his adversary or that he should obtain discovery for the purpose of assuring himself that he has overlooked nothing. The point is that the documents at issue are independently relevant as transactions ultimately at issue in the criminal proceeding. (See Cross Petition at 17).

[4]/ In only two of the cases cited by Martin Marietta's brief in opposition to the Cross Petition did the Court criticize a respondent for not raising issues in the Courts below. In *Jenkins v. Anderson,* 447 U.S. 231, 234 n. 1 (1980), the Court took pains to point out that Respondent's arguments involved issues of state law which are more appropriately addressed to lower courts more familiar with it; here, the questions under the Sixth Amendment, Rule 501 and the Work Product Doctrine are matters of general applicability throughout the Federal system. Moreover, since the Respondent ultimately won the case on the merits, the Court's avoidance of state law issues was hardly prejudicial. In *Federal Trade Commission v. Grolier, Inc.,* 462 U.S. 19, 23 n. 6 (1983), respondents attempted to raise for the first time in this Court a totally factual matter that appeared to have little, if any, general applicability.

extent Martin Marietta opposes the Cross-Petition for the purpose of narrowing issues involved in the instant proceedings, the Court's action on the Cross-Petition would not bring about the desired end, since Pollard must raise these issues anyway in response to Martin Marietta's Petition. Such action would simply make it impossible for Pollard to secure relief from the judgment below if the Court ultimately determines that he is right.

Consideration of the Cross-Petition issues will give the Court more options to dispose of the case in an efficient but just manner. In the unlikely event that the Court does not feel equipped to dispose of the Cross-Petition issues after briefing is completed, those issues might be remanded. Just such an approach was taken in *Youkakim v. Miller,* 425 U.S. 234 (1976). In that case the remand to the Court of Appeals was the only action taken by the Court. On the other hand, the Court might also opt for deciding work product issues on the grounds that the limited work product protection cannot be afforded in the circumstances of this case because of the issues raised in the Cross- Petition.

As shown in the Cross-Petition filed in Case No. 88-1338, and Pollard Memorandum in Opposition to Martin Marietta's Original Petition filed in 88-1157, the issues of waiver are inextricably involved with the factual context of this case. On the other hand, the issues raised in the Cross-Petition involve only questions of law which are generally applicable whenever a work product claim is made to withhold evidence from a defendant in a criminal case after that defendant makes a showing under Rule 17(c) that the material is needed for evidentiary purposes at trial. Since the Court of Appeals and the District Court have resolved the Rule 17(c) issue, the

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Here, Pollard is contesting the legal sufficiency of the underlying work product claim as a basis to deny him access to trial evidence where Rule 17(c) findings of admissibility, relevance and specificity were made below.

Court now will be able to focus directly upon the implications of the Rule 17(c) findings upon the legal sufficiency of the claim to work product protection.

Because the factual basis for the Cross-Petition need reach no further than the findings made below, the sparseness of the record below is no reason to deny it if the court were to grant Martin Marietta's Petition. As shown by both the Cross-Petition and Pollard's memorandum in opposition to the original petition, Martin Marietta has not been very consistent on factual matters which are vital to establishing its privilege and work product claims in the first instance. Pollard has not had the same opportunity to develop the record because he has never been given access to the materials. While the sparseness of the record constitutes grounds to decline the case as a whole and to await a more appropriate case to decide the waiver issues, it hardly constitutes grounds to prejudge issues of law raised in the Cross-Petition that may be dispositive of the case and avoid the necessity of delving into its factual intricacies.

CONCLUSION

In the event that the Court grants certiorari in Case No. 88-1157, it should also grant the Cross-Petition in the instant case.

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